No. 82-168

Office-Supreme Court, U.S.
FILED
JUL 30 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRANSPORTATION MANAGEMENT CORP.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158 (a)(3), if its hostility to an employee's protected union activities is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activities.

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v.

TRANSPORTATION MANAGEMENT CORP.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–8a) is reported at 674 F.2d 130. The decision and order of the National Labor Relations Board (App. C, *infra*, 10a–16a) and the decision of the administrative law judge (App. D, *infra*, 17a–45a) are reported at 256 N.L.R.B. No. 25.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 9a) was entered on April 1, 1982. On June 18, 1982, Justice Brennan extended the time for filing a petition for

a writ of certiorari to and including July 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies

> of this [Act]: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

STATEMENT

1. Respondent provides transportation services to various local school boards in Massachusetts (App. D, *infra*, 18a). On Monday, March 19, 1979, Sam Santillo, a school bus driver employed by respondent, visited union offices with a fellow employee and met union officials. They discussed union representation for respondent's drivers, and Santillo signed an authorization card designating the union as his collective-bargaining representative (*id.* at 19a). During the following week Santillo spoke to a number of fellow employees about the union, learned that some were interested, and obtained and distributed additional authorization cards. Several of the cards were signed and returned to him (*ibid.*). On Saturday, March 24, Santillo telephoned nearly all the drivers and told them of a union organizational meeting scheduled for Monday evening, March 26 (*id.* at 24a).

During the same week, beginning on March 22, George Patterson, respondent's area manager in Santillo's area, conducted what the Board found to be "an extensive campaign of interrogating a number of employees about their union activities" (App. D, *infra*, 23a; see App. C, *infra*, 10a–11a), and "ascertained that Santillo was one of the prime organizers of the union campaign" (App. D, *infra*, 23a). At one point, Patterson told employee Baer that he had learned of Santillo's involvement with the union, that Santillo was two-faced, and "that he was going to get even with Santillo" (*id.* at 20a). Patterson also asked employee

West, who was Santillo's brother-in-law, "'What's with Sam and the Union?'"; when West gave a noncommittal response, Patterson said that he took Santillo's activities "'personal,'" referred to certain favors he had extended to Santillo in the past, and said that he would remember Santillo's union activities when Santillo sought such favors in the future (*ibid.*). On Saturday morning, Santillo, having learned of Patterson's statements, telephoned Patterson; both were conciliatory, but Patterson said that when Santillo came to work on Monday, Patterson would "have to pretend in front of other employees that he was mad at Santillo" (*id.* at 21a).

The following Monday, March 26, Patterson fired Santillo "for leaving his keys in the bus, and taking unauthorized breaks" (App. D, *infra*, 24a). Santillo asked for the reasons in writing; after discussing Santillo's union involvement by telephone with respondent's President, Patterson refused this request. When Santillo said he would challenge his firing, Patterson said: "'By the way this has nothing to do with the Union'" (*id.* at 25a).

2. The Board, upholding the decision of the administrative law judge, found that respondent had violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), which makes it an unfair labor practice for an employer "by discrimination in regard to * * * tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[1] To reach this conclusion the

[1] Respondent's violation of Section 8(a)(3) also constituted a violation of Section 8(a)(1). In addition, the Board upheld the administrative law judge's conclusion that respondent violated Section 8(a)(1) by threatening and coercively interrogating employees and by creating the impression that employees were under surveillance because of union activities (App. D, *infra*, 40a; see App. C, *infra*, 10a–11a). The court of appeals sustained these conclusions (App. A, *infra*, 6a) and we present no issue concerning them.

Board applied the test it articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, No. 81-987 (Mar. 1, 1982). There the Board explained that in determining whether an employer's action violated Section 8(a)(3), it would first require the General Counsel to show that the employee's protected activities were a "motivating factor" in the employer's decision to take adverse action against the employee. If the General Counsel made this showing, the Board ruled—explicitly following this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977)—that the employer could avoid an unfair labor practice finding only if it proved, by a preponderance of the evidence, that the adverse action would have been taken even if the employee had not engaged in protected activities. 251 N.L.R.B. at 1089.

Here, the Board concluded, the General Counsel established that respondent "evidenced a strong union animus" and that it "had knowledge of Santillo's union activity and * * * intended to retaliate against Santillo because of" his union activities (App. C, *infra*, 12a). The Board accordingly found that the General Counsel had "established by strong and credible evidence a *prima facie* case for finding that Santillo was discharged in violation of Section 8(a)(3)" (*ibid.*).

The Board then considered whether respondent "has shown, by other evidence, that Santillo's discharge would have occurred without regard to these considerations" (App. C, *infra*, 12a). The first reason respondent offered for discharging Santillo was that he left his keys in his bus; the Board noted that it was common practice for drivers to leave their keys in the buses and that Patterson had decided to discharge Santillo before he learned that Santillo left his keys in the bus on the day of the discharge. It therefore concluded that this was a

"purely pretextual reason which does more to detract from the lawfulness of the discharge than support it" (*ibid.*). Respondent's second alleged reason was that Santillo took unauthorized coffee breaks; the Board found that "this was a normal practice among the drivers" and that it was "tolerated unless [it] * * * adversely affected the driver's job performance," in which case respondent might take some nondisciplinary action, such as changing the driver's route. But the Board found that no driver had ever been disciplined—"much less * * * suspen[ded] or discharge[d]"—for this reason (*id.* at 12a–13a).

The final reason offered by respondent was that Santillo made unauthorized stops at his home. The Board acknowledged that respondent did not condone this practice. But the Board found that respondent did not confront Santillo with the evidence of this unauthorized practice, warn him of the possible consequences, or "follow its regular procedure of three written warnings before discharge" (App. C, *infra*, 13a). The Board therefore concluded that respondent had not "establish[ed] * * * that Santillo would have been discharged, even absent his union activities" and accordingly had not rebutted the General Counsel's case (*ibid.*). The Board ordered Santillo reinstated with back pay (*ibid.*; see App. D, *infra*, 42a).

3. The court of appeals refused to enforce the Board's order on the ground that the Board's *Wright Line* test is inconsistent with the National Labor Relations Act (App. A, *infra*, 3a). Specifically, the court of appeals held that, even if the General Counsel had shown by a preponderance of the evidence that an impermissible motive underlay respondent's decision, respondent had only the burden of *producing evidence* that it would have taken the same action for permissible reasons. The court rejected the Board's *Wright Line* test insofar as that test places on an employer, shown to have acted

for an impermissible reason, the burden of *proving by a preponderance of the evidence* that it would have taken the same action for legitimate reasons. See App. A, *infra*, 3a, citing *NLRB* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981). Apparently concluding that the distinction between the burden of production and the burden of proof or persuasion may have affected the outcome in this case,[2] the court remanded the case to the Board for reconsideration under the standard it had specified (App. A, *infra*, 3a).

REASONS FOR GRANTING THE PETITION

The question presented in this case is of considerable practical importance to the administration of the National Labor Relations Act, and the decision of the court of appeals squarely conflicts with the decisions of five other courts of appeals. Moreover, the court of appeals erred in rejecting the Board's considered interpretation of the Act—a long-standing interpretation that has been specifically endorsed by Congress and is consistent with this Court's decisions in analogous areas. Review by this Court is therefore warranted.

1. An employer violates Section 8(a)(3) if it takes adverse action against an employee that is motivated by hostility to the employee's protected union activities. In *Wright Line*, the Board, noting some uncertainty about the meaning of earlier formulations, "set forth formally a test of causation for cases alleging violations of Section 8(a)(3)" (251 N.L.R.B. at 1083). The Board did so

[2] The court first expressed its criticisms of the Board's *Wright Line* test in the proceedings to review the *Wright Line* order. *NLRB* v. *Wright Line*, *supra*, 662 F.2d at 904–907. But because the court believed that the aspect of the test it rejected was not material to the outcome of *Wright Line* itself, it enforced the Board's order. *Id.* at 907–909. See also *Heartland Food Warehouse* v. *NLRB*, No. 81–1592 (June 1, 1982), slip op. 4.

in part because of the need to "provide litigants and the decisionmaking bodies with a uniform test" (*id.* at 1089) in the large number of Section 8(a)(3) cases.[3]

Initially every court of appeals that considered the question, including the First Circuit, approved the Board's *Wright Line* test. See *Statler Industries, Inc.* v. *NLRB*, 644 F.2d 902, 905 (1st Cir. 1981); *NLRB* v. *Robin American Corp.*, 654 F.2d 1022, 1025 (5th Cir. 1981), modified on other grounds, 667 F.2d 1170 (1982); *NLRB* v. *Lloyd A. Fry Roofing Co.*, 651 F.2d 442, 446 (6th Cir. 1981); *Peavey Co.* v. *NLRB*, 648 F.2d 460, 461 (7th Cir. 1981); *NLRB* v. *Nevis Industries, Inc.*, 647 F.2d 905, 909 (9th Cir. 1981). Indeed, the First Circuit specifically addressed the burden of proof issue and endorsed the Board's approach, disclaiming contradictory language in an earlier opinion. See *Statler Industries, Inc.* v. *NLRB*, *supra*, 644 F.2d at 905–906 n.4. Then in *NLRB* v. *Wright Line*, *supra*, the First Circuit explicitly changed direction again (see 662 F.2d at 905 n.10) and held that the Board's test improperly allocated the burdens of proof. That holding was the basis for its refusal to enforce the Board's order in this case. The Third Circuit has agreed with the First Circuit on this point. *Behring International, Inc.* v. *NLRB*, 675 F.2d 83, 86–90 (3d Cir. 1982).

The Eighth and Ninth Circuits have expressly disagreed with the First Circuit's decision in *Wright Line* and have endorsed the Board's approach instead. See, *e.g.*, *NLRB* v. *Senftner Volkswagen Corp.*, No. 82–1032 (8th Cir. July 8, 1982), slip op. 4–5; *Zurn Industries, Inc.* v. *NLRB*, Nos. 81–7219 and 81–7331 (9th Cir. July 2, 1982), slip op. 2877–2884.[4] The Eighth Cir-

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[3] Section 8(a)(3) violations were alleged in 58.5% of the 31,281 cases against employers brought before the Board in fiscal 1980. 45 NLRB Ann. Rep. 243 (1981).

[4] In his concurring opinion in the court below, Judge Breyer acknowledged the conflict among the circuits. App. A, *infra*, 6a–7a & n.2.

cuit said: "We have considered the First Circuit's criticisms of the [Board's] *Wright Line* analytical framework and believe they are not well taken." *NLRB* v. *Fixtures Manufacturing Corp.*, 669 F.2d 547, 550 n.4 (1982). Moreover, the Sixth Circuit has noted that "[i]n numerous decisions since the promulgation of the *Wright Line* test, this Court has accepted the Board's burden shifting formula as proper." *Republic Die & Tool Co.* v. *NLRB*, No. 81–1734 (June 15, 1982), slip op. 3 (collecting cases). See also *Borel Restaurant Corp.* v. *NLRB*, 676 F.2d 190, 192–193 (6th Cir. 1982). The Fifth and Seventh Circuits have also upheld the Board's approach. See *NLRB* v. *Berger Transfer & Storage Co.*, 678 F.2d 679, 691–692 (7th Cir. 1982) ("If a causal relationship between the discharge and protected activity is established, the employer is responsible under the Act unless he sustains his burden of proof."); *Red Ball Motor Freight, Inc.* v. *NLRB*, 660 F.2d 626, 627–628 (5th Cir. 1981), cert. denied, No. 81–1605 (May 24, 1982); *NLRB* v. *Charles H. McCauley Associates, Inc.*, 657 F.2d 685, 688 (5th Cir. 1981).[5]

We opposed certiorari in earlier cases in which the Board applied the *Wright Line* test, including *Wright Line* itself. See *Wright Line* v. *NLRB*, cert. denied, No. 81–987 (Mar. 1, 1982); *Pettibone Corp.* v. *NLRB*, petition for cert. pending, No. 81–2116 (filed May 17, 1982); *Red Ball Motor Freight, Inc.* v. *NLRB*, *supra*.

[5] The Second, Tenth, and Eleventh Circuits have acknowledged the Board's test but have not had occasion to rule on its validity. See *NLRB* v. *Charles Batchelder Co.*, 646 F.2d 33, 38–39 (2d Cir. 1981); *NLRB* v. *Carbonex Coal Co.*, 679 F.2d 200 (10th Cir. 1982); *Weather Tamer, Inc.* v. *NLRB*, 676 F.2d 483, 491 n.4 (11th Cir. 1982). The Fourth Circuit, after suggesting approval of the Board's *Wright Line* test (*B.E. & K., Inc.* v. *NLRB*, No. 80–1730 (Oct. 20, 1981), slip op. 11–12 & n.6), has indicated that the question is still open. See *Cedar Coal Co.* v. *NLRB*, 678 F.2d 1197, 1199 n.4 (4th Cir. 1982).

In those cases, however, the General Counsel had proved that the only legitimate reasons advanced by the employer for its action were pretexts. See 81-987 Br. in Opp. 8-9, 11-12; 81-2116 Br. in Opp. 6; 81-1605 Br. in Opp. 8. Consequently, the employer would not have been entitled to relief even under the First Circuit's approach. Here, however, the Board found that respondent did not carry his burden of persuasion, and the court of appeals—while not overturning that finding—declined to enforce the Board's order because it believed that the Board erred by assigning respondent more than a burden of production. This case, therefore, squarely presents a "conflict on what is obviously a recurring issue that should be resolved" (*Red Ball Motor Freight, Inc.* v. *NLRB*, *supra* (White, J., dissenting from the denial of certiorari)).

2. The legislative history of the Act shows that the court of appeals erred; indeed, Congress specifically addressed the issue on which the court of appeals disagrees with the Board and resolved it in the way reflected by the Board's *Wright Line* test.

Soon after the Act was passed, the Board, in applying Section 8(a)(3), adopted the view that where "a substantial motive for the discharge[ ] was the [employer's] desire to thwart the nascent Union[, a] violation is * * * established whether or not the [employer] may have had some other motive in addition * * *." *The Dow Chemical Co.*, 13 N.L.R.B. 993, 1023 (1939), enforced in relevant part, 117 F.2d 455 (6th Cir. 1941). The Board adhered to this rule through the time of the Taft-Hartley amendments to the Act (Labor Management Relations Act, ch. 120, 61 Stat. 136) adopted in 1947. See, *e.g.*, *Republic Creosoting Co.*, 19 N.L.R.B. 267, 294 (1940); *United Dredging Co.* 30 N.L.R.B. 739, 766 n.24 (1941); *Lone Star Gas Co.*, 52 N.L.R.B. 1058,

1060 (1943); *John W. Campbell, Inc.*, 58 N.L.R.B. 1153, 1162–1163 (1944); *Carl L. Norden, Inc.*, 62 N.L.R.B. 828, 831 n.11 (1945).

At the same time, however, the Board stated that an employer whose action was in part impermissibly motivated could avoid a finding of an unfair labor practice by showing that it would have taken the same action in the absence of the impermissible motive; but the Board made it clear that, in such a situation, the burden of persuasion was on the employer. As the Board explained (in a case in which an employer was charged with discriminatorily denying reemployment):

> In claiming * * * that certain factors were present which would have precluded some employees from reemployment even in the absence of the illegal condition, the [employer] must assume the burden of "disentangling the consequences for which it was chargeable from those from which it was immune." * * * The question is * * * whether the [employer] would have refused employment to these employees entirely apart from the improper practices which we have found were committed. Where two motives for [an action] may have existed, one clearly improper and one a just cause for severance of the employer-employee relationship, and where the improper motive is found to have been present in general, we must require the [employer] to adduce clear and convincing proof that the [adverse action would have been taken] for proper cause entirely apart from illegal considerations.

Eagle-Picher Mining & Smelting Co., 16 N.L.R.B. 727, 801 (1939), enforced in relevant part, 119 F.2d 903 (8th Cir. 1941), quoting *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir.), cert. denied, 304 U.S. 576 (1938); footnote omitted. See also *Borden Mills, Inc.*, 13 N.L.R.B. 459, 474–475 (1939) (suggesting that it may "constitute a defense to the unfair practice alleged to prove that the discharge would have taken

place without consideration of the [impermissible] cause"); *Salmon & Cowin, Inc.*, 57 N.L.R.B. 845, 846 n.1 (1944), enforced, 148 F.2d 941 (5th Cir. 1945); *Philip Vandernoot*, 64 N.L.R.B. 529, 537 (1945) (footnote omitted) ("[W]e * * * have here two causes, one legal, the other illegal. But unless [the employee] would have been discharged absent the illegal motivation, responsibility remains, and the burden was on the [employer] to disentangle the legal from the illegal."); *Wright-Hibbard Industrial Electric Truck Co.*, 67 N.L.R.B. 897, 908 n.15 (1946); *Robbins Tire & Rubber Co.*, 69 N.L.R.B. 440, 454 n.21 (1946), enforced, 161 F.2d 798 (5th Cir. 1947).

This approach—which is virtually identical to the Board's *Wright Line* test—was criticized by some members of Congress during the deliberations on the Taft-Hartley amendments. See, *e.g.*, H.R. Rep. No. 245, 80th Cong., 1st Sess. 42 (1947). The House passed a version of what became Section 10(c) of the Act, 29 U.S.C. 160(c), that specified the approach adopted by the court of appeals in this case; the House bill forbade the Board from granting relief to a discharged or suspended employee "unless the weight of the evidence shows that such individual was not suspended or discharged for cause" (H.R. 3020, 80th Cong., 1st Sess. § 10(c) (1947)).

Congress, however, rebuffed this effort to alter the Board's rule. The conference committee amended the proposed Section 10(c), deleting the phrase "unless the weight of the evidence shows" and providing simply that the Board could not order relief for an employee who was suspended or discharged "if such individual was suspended or discharged for cause." H.R. Rep. No. 510, 80th Cong., 1st Sess. 13 (1947); see *id.* at 55. This version of Section 10(c) was enacted by Congress, and it remains in force today. Senator Taft, a sponsor of the Taft-Hartley amendments and member of the confer-

ence committee, explained that the purpose of the conference amendment was to reaffirm the Board's existing practice—once an impermissible motive was shown, the employer was to bear the burden of proving that he would have taken the same action for permissible reasons:

> The House language provided that the burden of proof should be on the employee to show that he was not discharged for cause. The Senate conferees took the position that the question was whether he was discharged for cause, and that the burden of proving that cause should be on the employer, because the information is in his hands. So we did not accept the House provision. All this language does is simply to say exactly what the present rule is.
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> * * * * *
>
> [T]here is no intention whatever to change the existing law on this particular question.
>
> * * * * *
>
> The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board.

93 Cong. Rec. 6518–6519 (1947). See also *id.* at 7529 (remarks of Sen. Ball).

In short, Congress specifically endorsed the Board's approach, and the court of appeals has "adopt[ed] by judicial fiat an interpretation that Congress specifically rejected when it enacted the 1947 amendments to the NLRA" (*Jacksonville Bulk Terminals, Inc.* v. *Inter-*

national Longshoremen's Association, No. 80–1045 (June 24, 1982), slip op. 17). See also *North Haven Board of Education* v. *Bell*, No. 80–986 (May 17, 1982), slip op. 16, quoting *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974) (The "deletion of a provision by a Conference Committee 'militates against a judgment that Congress intended a result that it expressly declined to enact.'"). As this Court has recently reiterated, "'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially where Congress has refused to alter the administrative construction.'" *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, No. 80–885 (Dec. 2, 1981), slip op. 7, quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). The statements of Senator Taft could hardly be more plain: he understood the Board's rule to place the burden of proof on the employer who is shown to have relied on unlawful considerations, and he intended that aspect of the rule—the precise aspect of the *Wright Line* test that was rejected by the court of appeals—to continue in force. See *North Haven Board of Education* v. *Bell*, *supra*, slip op. 14 ("remarks * * * of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction"); *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964). Especially in light of the principle that "if [the Board's] construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute" (*Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979)), the court of appeals' rejection of the Board's *Wright Line* test was, therefore, clearly unwarranted. See *Zurn Industries, Inc.* v. *NLRB*, *supra*.

3. The Board expressly patterned its *Wright Line* test on this Court's decision in *Mt. Healthy City School*

District Board of Education v. *Doyle*, 429 U.S. 274 (1977). See 251 N.L.R.B. at 1083, 1086–1089. In *Mt. Healthy*, a public school teacher was denied tenure for two stated reasons. One reason was that he had engaged in certain constitutionally protected conduct, and the Court held that a school board cannot deny tenure for that reason. 429 U.S. at 283–284. The other stated reason, however, was clearly a legitimate ground for denying tenure. The Court ruled that the burdens of proof should be allocated as follows (*id.* at 287; emphasis added; footnote omitted):

> Initially, * * * the burden was properly placed upon [the employee] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the [School] Board had shown by a *preponderance of the evidence* that it would have reached the same decision as to [the employee's] reemployment even in the absence of the protected conduct.

See also *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 270–271 n.21 (1977). In view of the analogy between Section 8(a)(3) cases and cases alleging unconstitutional motivation, and Congress's endorsement of the burden-shifting approach under Section 8(a)(3), the Board was plainly entitled to conclude that "the *Mt. Healthy* procedure * * * serv[es] to effectuate the policies and objectives of Section 8(a)(3)" (*Wright Line, a Division of Wright Line, Inc.*, *supra*, 251 N.L.R.B. at 1088–1089).

Apparently, the court of appeals thought *Mt. Healthy* inapposite because in that case the employer conceded that his action was prompted partly by the

employee's protected activity, while here respondent denied any such motivation. See *NLRB* v. *Wright Line*, *supra*, 662 F.2d at 906. But the court of appeals suggested no reason for distinguishing between a finding of an improper motivating factor based on an employer's admission and a finding based on contested evidence. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 270–271 n. 21 (*Mt. Healthy* approach adopted in case involving contested motivation).

The court of appeals also relied (662 F.2d at 907) on *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), which deals with the order of proof in cases alleging intentional employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See also *Behring International, Inc.* v. *NLRB*, *supra*, 675 F.2d at 88–89. But *Burdine* and *Wright Line* involve different issues. *Burdine* describes how a Title VII plaintiff might prove that racial discrimination played a role in the employer's decision (see 450 U.S. at 253, 256); *Wright Line*, like *Mt. Healthy*, deals with the subsequent question of how, once an impermissible factor is shown to have played a role, the defendant might still avoid liability. See *Village of Arlington Heights* v. *Metropolitan Ho[illegible]ng Development Corp.*, *supra*, 429 U.S. at 265–266, [illegible]–271 n.21 ("When there is a proof that a discriminatory purpose has been a motivating factor in the [challenged] decision, * * * judicial deference is no longer justified. * * * Proof that the decision * * * was motivated in part by a racially discriminatory purpose * * * shift[s] to the [decisionmaker] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

RICHARD MICHAEL FISCHL
Attorney
National Labor Relations Board

JULY 1982

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 81-1537

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORP., RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before
COFFIN, *Chief Judge*,
TIMBERS,* *Senior Circuit Judge*,
and BREYER, *Circuit Judge*.

April 1, 1982

PER CURIAM. The National Labor Relations Board seeks enforcement against the Transportation Management Corporation (the "Company") of an order based upon Board findings that the Company violated § 8(a)(1)[1] and § 8(a)(3)[2] of the National Labor Rela-

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*Of the Second Circuit, sitting by designation.

[1]Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . ." 29 U.S.C. § 158(a)(1) (1976). Section 7 provides in perti-

tions Act. Several of the findings of § 8(a)(1) violations are adequately supported by the record. The record reveals, for example, that Paterson, a supervisor, spoke to West, an employee and the brother-in-law of Santillo, another employee who was a union activist. In the conversation Paterson referred to Santillo's union activity, suggested that he (Paterson) was taking it "personal," noted that he had previously given Santillo favors (such as letting him park his car in Paterson's yard and giving him time off in the summer to work on another job), and threatened that in the future "I'll remember it." Paterson also told a different employee, Baer, that he would "get even" with Santillo. While Paterson's motives were the subject of conflicting testimony, there is ample ground for a fact finder to conclude that Paterson's threats were union-oriented, gave an impression of surveillance, *see NLRB* v. *Rich's of Plymouth, Inc.*, 578 F.2d 880 (1st Cir. 1978), and constituted unlawful coercion. *NLRB* v. *A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 996–97 (2d Cir. 1976), *cert. denied*, 430 U.S. 914 (1977).

The Board also found the Company's discharge of Santillo unlawful under both §§ 8(a)(1) and 8(a)(3) of the Act. In making this finding, however, the Board did not conclude that "upon the preponderance of the testimony taken," it was "of the opinion" that the Company had engaged in an unfair labor practice. National Labor

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nent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *Id.* § 157.

[2] Section 8(a)(3) provides in pertinent part: "It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (1976).

Relations Act § 10(c), 29 U.S.C. § 160(c). Rather, it based its finding of a violation upon a conclusion that the Company "failed to meet its burden of *overcoming* the General Counsel's *prima facie* case by establishing by competent evidence that Santillo would have been discharged even absent his union activities." (Emphasis added.) While this court has upheld the Board's practice of imposing upon the Company the burden of *neutralizing* the implication of sufficient anti-union motive arising from the General Counsel's *prima facie* case, *Statler Industries, Inc.* v. *NLRB*, 644 F.2d 902 (1st Cir. 1981); *NLRB* v. *Amber Delivery Service, Inc.*, 651 F.2d 57 (1st Cir. 1981); *NLRB* v. *Cable Vision*, 660 F.2d 1 (1st Cir. 1981), it has rejected both explicitly, *NLRB* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), and implicitly, *NLRB* v. *Amber Delivery Service, Inc.*, 651 F.2d at 69; *NLRB* v. *Cable Vision*, 660 F.2d at 8; *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 n.12 (1st Cir. 1979),[3] any effort by the Board to impose a *greater* burden than this upon the Company, as outside the Board's statutory authority. We therefore remand this case to the Board for reconsideration under the standard of *NLRB* v. *Wright Line*, *supra*. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). Since the Board's order is based in large part upon Santillo's discharge, we do not believe that partial enforcement at this time is appropriate.

So ordered.

BREYER, *Circuit Judge* (concurring). The Board, in oral argument in this case and in briefs in subsequent cases, has indicated an unwillingness to follow this court's decision in *NLRB* v. *Wright Line*, 662 F.2d 899

[3] While *Statler Industries* did appear to approve the Board's *Wright Line* test, which imposes such a burden, it did not focus upon this particular subsidiary issue.

(1st Cir. 1981), and has asked for reconsideration. While I join the court's opinion here, I also concur separately to state my reasons for rejecting the Board's request.

First, I think the Board may overestimate the extent of the difference between its formulation and our own. Both Board and court agree that in a "dual motive" discharge case "the initial inquiry is whether the Board has made a *prima facie* showing that a 'significant improper motivation' underlay the Company's action." *NLRB* v. *Cable Vision*, 660 F.2d 1, 8 (1st Cir. 1981); *NLRB* v. *Amber Delivery Service*, 651 F.2d 57, 69 (1st Cir. 1981); *Statler Industries, Inc.* v. *NLRB*, 644 F.2d 902, 905 (1st Cir. 1981); *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979). In making this *prima facie* case, the Board must establish the "requisite knowledge by the Company of union activity." The "bad reason may [then] be shown by independent evidence or by the circumstances of the discharge itself." *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d at 670. Both Board and court also agree that thereafter "the burden . . . shifts to the Company to 'prove that it had a good reason, sufficient in itself, to produce' the [discharge] . . . *Statler Industries, Inc.* v. *NLRB*, 644 F.2d at 905, *quoting NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d at 671." *NLRB* v. *Cable Vision*, 660 F.2d at 12. But, the Board and court apparently do not agree about who should win if, after both sides have submitted their evidence, the evidence is in "equipoise."

We made clear both in *Cable Vision* and in *Amber Delivery* that in such a situation, the employer must prevail, for we wrote, "This shift [of the burden of proof to the Company] does not impose an overall burden upon the Company of proving itself 'innocent' of violating the statute. Rather, it must simply come forward with enough evidence to convince the trier of fact

that, under the circumstances, there is no longer a preponderance of evidence establishing a violation." *NLRB* v. *Cable Vision*, 660 F.2d at 13. This language generalized the court's statement in *Eastern Smelting* that when the employer presents evidence of a good and sufficient motive for the discharge, the Board "may not reject the employer's proof, absent a reasonable basis." *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d at 671 n.12. In turn, *Cable Vision* and *Amber Delivery* elaborated this point, and finally the point was analyzed still more carefully in *Wright Line*. Yet there is nothing in *Wright Line* that reflected any departure from prior court decisions.

While the *Wright Line* formulation does, of course, mean that the employer wins in a case where the record cannot be fairly said to make out a violation by a preponderance of the evidence, this is surely what one would expect. *See Edison Co.* v. *Labor Board*, 305 U.S. 197, 229 (1938). The burden of proof formulation does not itself add to, or detract from, the requirement of substantial evidence. *Cf. Miranda* v. *HEW*, 514 F.2d 996, 998 (1st Cir. 1975). Thus, I do not see the court's *Wright Line* formulation as being of great practical significance. *Wright Line*, for example, does not tell the Board what it can, or cannot, conclude from silences in the record; that is a matter governed by the facts of a particular case, experience, and common sense.[1] Rather, *Wright Line* simply tells the Board that

[1] *E.g.*, if I see water pouring down outside the window, I can reasonably infer that it is raining, although my inference in part depends upon the absence of evidence that there are small boys with a garden hose standing on the roof. Add to the record, however, the facts that there are such small boys and the sun is shining, and my inference of rain becomes unreasonable. If I try to support it by pointing to an *absence* of evidence in the record that the hose was turned on, I am still acting unreasonably. Because of the *facts* involved, a conclusion based in part upon the

after the evidence is in, it must itself make a judgment about whether the evidence *overall* does or does not support a finding of violation; it cannot avoid this issue by retreating to the language of "burdens of proof."

Second, as the court pointed out in *Wright Line*, the relevant statutes compel the result we reached. Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides that the Board must dismiss a complaint when "upon the preponderance of the testimony taken" the Board "shall not be of the opinion" that an unfair labor practice was commited. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556, states that "Except as otherwise provided by statute, the proponent of [an] order has the burden of proof." And, the Board's rules themselves state that "the Board's attorney has the burden of proof of violations of section 8." 29 C.F.R. § 101.10(b). How, in the face of this language, is it possible not to hold that the overall burden of proving a violation remains with the Board?

The Eighth Circuit has recently written that there is a "reasonable basis in law" for the Board's *Wright Line* burden shifting, apparently disagreeing as well with the narrow "overall burden" question at issue here. *NLRB* v. *Fixtures Mfg. Co.*, No. 81–1398, slip op. at 6–7 n.4 (8th Cir. Jan. 14, 1982)[2]. The Eighth Circuit

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record's silence is reasonable in the first instance but not in the second. Most silences in an administrative record are of this factual sort; burden of proof rules only occasionally affect the conclusions that might be drawn from them.

[2]There are decisions in other circuits either accepting—*NLRB* v. *Robin American Corp.*, 654 F.2d 1022 (5th Cir. 1981); *NLRB* v. *Consolidated Freightways Corp.*, 651 F.2d 436 (6th Cir. 1981); *Charge Card Ass'n* v. *NLRB*, 653 F.2d 272 (6th Cir. 1981); *Peavey Co.* v. *NLRB*, 648 F.2d 460 (7th Cir. 1981); *NLRB* v. *Nevis Industries, Inc.*, 647 F.2d 905 (9th Cir. 1981)—or rejecting—*TRW, Inc.* v. *NLRB*, 654 F.2d 307 (5th Cir. 1981)—the Board's *Wright Line* test. But with the excep-

rests its opinion, however, upon its belief that the "overall burden" question is one as to which a court should defer to agency views. I doubt that this is so: Whether the Board can impose such an overall burden on the employer is a pure question of law. It involves a major and important section of the authorizing statute; it is not "interstitial;" and the language of the statute as well as its legislative history seem clear. *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491–93 (1947); *Constance* v. *Secretary of Health and Human Services*, No. 81–1322, slip op. at 11 (1st Cir. March 5, 1982). The fact that the agency might find such burden shifting administratively useful would be significant had Congress intended to delegate such authority to the agency, but that is not the case here. *Social Security Board* v. *Nierotko*, 327 U.S. 358, 368–69 (1946). Here the issue is one of statutory language and congressional intent. These indicate quite clearly that the Board, not the employer, must bear the overall burden of showing a violation of the Act.

Finally, it is worth recalling that one major purpose underlying court review of administrative agency decisions is that of keeping agency action within statutory bounds laid down by Congress—including those statutory qualifications that limit the agency's more important basic mission. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975). To do so, Congress has entrusted courts with primary responsibility for determining questions of law related to the agency's mission. Administrative Procedure Act § 10(e), 5 U.S.C. § 706. And, to prevent the agencies from extending that mission or escaping statutory limitations through one-sided fact-finding, Congress has required the courts to make certain that fac-

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tion of *Fixtures*, and possibly *Nevis*, none has considered explicitly the point here at issue.

tual findings are supported by "substantial evidence" on the basis of the "whole record." *Id. See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487–92 (1951). This historic division of tasks between court and agency, and the major purpose underlying it, suggests why it is desirable to require the Board to certify that, after hearing both sides, it still believes the evidence in the record by a preponderance shows a violation of the statute: Doing so forces the agency to focus directly on what Congress told it to do; it prevents the agency from retreating behind the opaque language of "burden of proof;" and it simplifies the work of a reviewing court, which would otherwise be uncertain as to when it could, and when it could not, properly overturn an agency decision. (Compare the difficulty of deciding whether there is substantial evidence on the record as a whole that the employer has not *proved* that the bad motive did *not* move him.)

In sum, this court's *Wright Line* opinion imposes little practical burden on the Board; it is required by statute; and it is, in terms of general agency/court relations, simplifying. I therefore think this court is correct in deciding not to modify it.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 81-1537

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORP., RESPONDENT.

DECREE

Entered: April 1, 1982

This cause came on to be heard on application for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The petition for enforcement of the National Labor Relations Board is denied and the proceeding is remanded to that Board for reconsideration in accordance with the opinion of the Court filed this day.

No costs.

By the Court:

/s/ _____

DANA H. GALLUP
Clerk.

A True Copy
Attest:

DANA H. GALLUP
Clerk.

APPENDIX C

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 1—CA—15846

256 NLRB No. 25

FJZ
D—7597
Springfield, MA

TRANSPORTATION MANAGEMENT CORP.

AND

GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY & HIGHWAY CONSTRUCTION EMPLOYEES LOCAL UNION 404, A/W THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On February 8, 1980, Administrative Law Judge Steven B. Fish issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclu-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are in-

sions[2] of the Administrative Law Judge, as clarified herein, and to adopt his recommended Order,[3] as modified herein.

The Administrative Law Judge found, and we agree, that Respondent discharged employee Santillo in violation of Section 8(a)(3) and (1) of the Act. We arrive at that conclusion by applying to the facts of this case the test we have recently enunciated in our Decision in *Wright Line, Inc.*[4] In the application of this test, the first element to be determined is whether the General Counsel has established a *prima facie* case for the finding of a violation.

In this regard the General Counsel established by credible evidence that Santillo was a leading union activist and, in fact, was the one responsible for first contacting the Union. Respondent soon became aware of Santillo's role as union activist by its unlawful interrogation of employees. Thus, in a conversation between Respondent's manager, Patterson, and employee Baer, Patterson stated that he had heard that Santillo had started the Union and that he (Patterson) considered Santillo to be "two faced" and threatened to get even with him. In another conversation between Patterson and employee West, Patterson asked West, "What's with Sam and the Union" and Patterson promised to re-

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correct. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] On the basis of *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), the broad order recommended by the Administrative Law Judge is not warranted. Accordingly, we shall modify the recommended Order in this respect.

[3] Member Jenkins would compute interest in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB No. 11 (1980).

[4] *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (1980).

member Santillo's union activity when Santillo wanted privileges.

The foregoing evidence establishes beyond doubt that Respondent had knowledge of Santillo's union activity and that it intended to retaliate against Santillo because of these actions. It also demonstrates that Respondent evidenced a strong union animus. Finally, Santillo was discharged the day after Patterson made his threat to "get even" with Santillo. In such circumstances, we find that the General Counsel has established by strong and credible evidence a *prima facie* case for finding that Santillo was discharged in violation of Section 8(a)(3) of the Act.

The only remaining question, therefore, is whether Respondent has shown, by other evidence, that Santillo's discharge would have occurred without regard to these considerations. Respondent offers three reasons to justify Santillo's discharge. The first is that he left the keys in his bus on the day of his discharge, which is a violation of company policy. The evidence shows, however, that it is a common practice among the drivers to leave the keys in their buses and, in Santillo's case, we have Patterson's admission that he had decided to discharge Santillo before he had any knowledge that the keys had been left in the bus. Accordingly, we conclude, as did the Administrative Law Judge, that this is nothing more than a purely pretextual reason which does more to detract from the lawfulness of the discharge than support it.

The second reason offered by Respondent was that Santillo was "stealing time" by taking unauthorized coffeebreaks. In this connection, the evidence shows that Santillo did in fact take coffeebreaks, but this was a normal practice among the drivers. The evidence further shows that such practices were tolerated unless these breaks affected the driver's ability properly to

perform his job functions. In situations where the taking of such breaks adversely affected the driver's job performance, Respondent's practice was to change the driver's route, increase the number of children to be delivered, or refuse to pay the driver who was taking unauthorized time. In no such instance is there any evidence of disciplinary action being taken, much less any suspension or discharge.

The third and last reason relied on by Respondent was Santillo's practice of stopping off at his home before reporting at the garage which Respondent also characterized as "stealing time." The evidence establishes that Santillo, in fact, did engage in such a practice and there is no showing that Respondent either directly or indirectly condoned such a practice. On the other hand, when Respondent finally became convinced that Santillo was taking unauthorized time, Respondent did not confront him with the evidence or warn him of possible disciplinary action. Nor did Respondent follow its regular procedure of three written warnings before discharge.

On the basis of this evidence, we conclude that Respondent has failed to meet its burden of overcoming the General Counsel's *prima facie* case by establishing by competent evidence that Santillo would have been discharged, even absent his union activities. Accordingly, we find, in agreement with the Administrative Law Judge, that Respondent discharged Santillo in violation of Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Transportation Management Corp., Springfield, Massachusetts, its

agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(e):

"(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. May 20, 1981

JOHN H. FANNING,
Chairman

HOWARD JENKINS, JR.,
Member

DON A. ZIMMERMAN,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

We intend to abide by the following:

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collectively bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge or otherwise discriminate against any employees to discourage membership in General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction Employees Local Union 404, a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against our employees because of their activities on behalf of or support for the Union or any other labor organization.

WE WILL NOT interrogate our employees regard-

ing their activities on behalf of or support for the Union or any other labor organization.

WE WILL NOT create the impression among our employees that we have engaged in surveillance of their union or other concerted activities.

WE WILL NOT threaten our employees that we will get even with employees, or withdraw privileges or favors previously granted to employees, or otherwise retaliate against our employees, because of our employees' activities on behalf of or support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Sam Santillo immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights, and privileges previously enjoyed, and WE WILL compensate him, with interest, for any loss of pay he may have suffered because we terminated him.

TRANSPORTATION MANAGEMENT CORP.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3313.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CASE NO. 1-CA-15,846
JD-(NY)-4-80
SPRINGFIELD, MA

TRANSPORTATION MANAGEMENT CORP.

AND

GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY & HIGHWAY CONSTRUCTION EMPLOYEES LOCAL UNION 404, A/W THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

THOMAS P. KENNEDY, *Esq.*,
for the General Counsel

C. FRED WELENSKY, *Esq.*,
of Boston, MA, for the Respondent.

DECISION

Statement of the Case

STEVEN B. FISH, Administrative Law Judge: Upon a charge filed on March 28, 1979,[1] by General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction Employees Local Union 404, a/w The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, the Regional Director for Region 1 issued a Complaint and

[1] All dates are in 1979 unless otherwise stated.

Notice of Hearing on May 9. The Complaint alleges that Transportation Management Corp., herein called Respondent or the Company, violated Section 8(a)(1), and (3) of the Act, by interrogating its employees concerning their union activity, warning an employee that it would get even with another employee who was active on behalf of the Union, creating the impression of surveillance of Union activity among its employees, and by discharging and refusing to reinstate its employee Sam Santillo, herein called Santillo, because he joined and assisted the Union.

Pursuant to notice, a hearing was held before me on October 4 and 5 in Northampton, Massachusetts. Briefs have been received from counsel for General Counsel and counsel for Respondent, and have been duly considered.

Upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent, a Massachusetts Corporation, maintains an office and place of business in Springfield, Massachusetts, where it is engaged in providing transportation services to various local school boards in the Commonwealth of Massachusetts. Respondent, annually, purchases gasoline and automobile products valued in excess of $50,000, indirectly from points located outside the State of Massachusetts. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted that and I accordingly conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Facts*

Santillo began his employment at Respondent's Springfield location in October 1976 as a school bus driver. Of the 70 or so drivers employed at this location by Respondent, three or four employees were more senior than Santillo. Santillo began at a salary of $2.30 per hour, and received various raises from 1976 through 1979 to a salary of $6.15 per hour.

On March 19, Santillo and employee John Walker went to the offices of the Union.[2] They spoke to Union officials Eddie Lymon and John Adamski and discussed the possibility of sending Union representatives down to the garage to speak to the drivers. Santillo signed an authorization card for the Union on that day.

Santillo then returned to work and spoke to six or seven other drivers about supporting the Union, and ascertained that these employees were interested. The next day, March 20, Santillo returned to the Union hall and picked up 50–60 authorization cards to distribute to the employees. Santillo over the next several days distributed cards to and discussed the Union with a number of employees at the garage, in the parking lot, and some outside the Respondent's premises who live in Santillo's area. By March 23, Santillo testified that he had obtained seven signed authorization cards from Respondent's employees.

On March 22, George Patterson, Respondent's Springfield area manager, approached Joseph Baer, a driver and mechanic of Respondent, at about 10 p.m. at the Train Stop in Holyoke, Massachusetts, where Baer was employed as a musician at night. According to

[2]Prior, thereto, employees had been complaining among themselves about various problems on the job, such as gassing up on their own time, and time going from their home to pick up children being unpaid time.

Baer, this was the first time that Patterson had ever appeared where Baer was working at night. Patterson asked Baer if he heard anything about the Union. Baer replied no, and the conversation ended.

The next night, March 23, Baer was performing at Lynn's Lounge in Chicopee, and Patterson again appeared. On this occasion Patterson told Baer that he (Patterson) heard Santillo started the Union, called Santillo two faced, and said that he was going to get even with Santillo. Patterson also complained to Baer about Santillo calling Patterson's girlfriend and trying to go out with her, and again stated that he would get even with Santillo.[3]

On the same evening, March 23, at about 7 p.m., at the Respondent's terminal, Patterson had a conversation with Ed West, a driver, who is the brother-in-law of Santillo. Patterson asked West, "What's with Sam and the Union?" West replied that he did not know anything about it, other than Sam had a lot of people complaining to him and he just wanted to help them. Patterson replied that he was taking it "personal" and referred to the fact that Patterson had permitted Santillo to park his car in Patterson's yard and had allowed Santillo to take time off from work in the summer to go to another job.[4] Patterson added that when Santillo wants such favors again, "I'll remember it."[5]

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[3]These findings are based on the undenied testimony of Baer which I credit.

[4]Apparently, Santillo had a job running a Fair stand in the summer and was permitted by Patterson to leave early for this purpose.

[5]These findings are based on the testimony of Ed West. Patterson testified that he recalls a conversation with West on that evening, but does not recall anything that was said, other than that the subject of the Union was not mentioned. I credit the testimony of West since I found him to be a believable and

West, on that evening went home and told Santillo of his conversation with Patterson.

The next morning, March 24, at around 11 a.m., Santillo called Patterson at Respondent's premises. Santillo told Patterson that West had informed him that Patterson was taking it personally, and that he wanted Patterson not to take it personally. He went on to say that he still feels that Patterson was his friend and that it is really between the Union and TMC. Santillo added that he understood Patterson's position, being manager, but that in Santillo's view, "you and I are out of the picture." Patterson answered that he understood, and that when Santillo explains this union thing to the drivers, that he should make sure to explain to them what the rates really are. Santillo replied, that he was accurately informing the employees about the rates of pay, and that he was just telling them that the union is possibly coming to talk to the employees. Patterson concluded the conversation, by saying that when Santillo comes in on Monday morning that he (Patterson) was going to have to pretend in front of other employees that he was mad at Santillo.

Patterson testified that he was rather upset at the time of this conversation. When asked what he was upset about at the time, Patterson responded, "I was upset about the time and the union, being in about my 70th hour of work. I was pretty much upset at that time."

On that same Saturday morning, March 24, Patterson had a further conversation with employee Baer at the garage.[6] Patterson asked Baer if he had signed a

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forthright witness, and particularly since Patterson could not recall any part of the conversation.

[6]The record does not establish whether or not this conversation was before or after Patterson's phone conversation with Santillo discussed above.

union card. Baer denied that he had signed. Patterson then told Baer about the time that he had some dealings with the Union and how they screwed him. Patterson then went into his office and came out a few minutes later. He then told Baer that he was not supposed to ask any questions about the Union. Baer replied that he could have told Patterson that. Patterson asked why Baer had not told him and then told Baer not to mention anything about the conversations they had about the Union.

These findings are based on the undenied testimony of Baer which I credit. Patterson, although he did not testify concerning any conversations with Baer, did indicate that either on Friday night or Saturday, he was briefed by Respondent's Vice-President Sullivan on his obligations under Federal Law with respect to discussing the Union with employees. This tends to reinforce Baer's testimony that he was told by Patterson that the latter was not supposed to ask any questions about the Union. Patterson admitted that he had questioned several drivers about the Union. The only specific employee that he recalled asking was driver David Stebbins. Patterson admitted that he asked Stebbins if he knew anything about the Union and Stebbins replied yes and that he had in fact signed a card and was for the Union. Patterson then asked why he was for the Union and Stebbins responded that it takes a giant to fight a giant. Patterson then added that he could see that point, but asked Stebbins if he ever had any problems with this organization as far as grievances go. Stebbins replied no.

Patterson also testified in response to a question from his attorney that prior to Santillo's discharge, he was aware of the fact that about 22 other employees (including Baer and West) were also in favor of the Union. His knowledge according to Patterson, with the exception of Stebbins, came from discussions with other

employees, in all cases initiated by the employees themselves. However, on cross-examination Patterson could not recall which employees had told him about the Union activities of the employees named, nor any details about any of the conversations.

Patterson also admitted that he was aware of Santillo's Union activities sometime prior to March 26. At first Patterson testified that his first knowledge of Santillo's activities came during the phone conversation that he had with Santillo on March 24 in which Santillo told him not to take it personally. Patterson later changed his testimony on this issue, and said that he had been told unsolicited by one or two employees that Santillo had approached them and was talking about the Union. He also testified that he was unaware that Santillo had any leadership role in the Union's organizational activities at the Respondent's premises.

I find Patterson's testimony in this area to be highly dubious and unworthy of credence.

Since I have already credited Baer and West that Patterson interrogated them about Union activities, during which Santillo's Union activities in particular were discussed, and Patterson accused Santillo of having started the Union, and since I find it incredible to believe that 22 employees would approach Patterson and unsolicited tell him about union activities of others, as well as Patterson's own admission that he did recall specifically interrogating one employee, and his earlier testimony that he also asked several others about union matters, and the fact that he admits being told by higher management on March 24, that under the law he should not be asking employees about the union, I find that during the week prior to Santillo's discharge on March 26, Patterson conducted an extensive campaign of interrogating a number of employees about their union activities during which he ascertained that Santillo was one of the prime organizers of the union campaign.

On Saturday, March 24, Santillo called about 70 drivers on the phone, and informed them of a Union meeting to be held on Monday, March 26 at 6 p.m. at the Union hall on Chestnut Street.

On Monday, March 26, Union officials Lymon and Adamski were outside the Respondent's premises distributing leaflets, announcing the Union meeting held that evening. Santillo at about 9:30 a.m. stopped and spoke to the Union officials for a period of about 15 minutes. There is no evidence in the record that any management officials saw Santillo speaking with these Union officials. Patterson admits that he saw the Union officials distributing leaflets on that day and that he read them and was therefore aware that a Union meeting was scheduled to be held on that evening. Patterson denies that he observed or was aware of Santillo talking to the Union officials while the leaflets were being distributed. General Counsel characterizes Patterson's testimony in this regard as "impossible to believe," and urges that Patterson be found to have been aware of Santillo's speaking to the Union agents while leaflets were being distributed. Although, it can be surmised that Patterson may have observed or been made aware of this activity by Santillo, I find that it is also conceivable that Patterson did not happen to look out at the Union officials leafleting during the 15 minute period that Santillo was talking with them. Accordingly, I find the record insufficient to establish that Respondent was aware of this activity on the part of Santillo on March 26.

Later on in the day, Santillo was called into Patterson's office. Present were Patterson, Santillo and Russel Van Horn, Respondent's supervisor. Patterson informed Santillo that he was being fired for leaving his keys in the bus, and taking unauthorized breaks. Santillo asked for the reasons in writing and Patterson told him to wait outside while he calls the main office.

Patterson then called the office and spoke to Richard Zimmerman, Respondent's president. Patterson informed Zimmerman of the fact that he had terminated Santillo, and told him that Santillo was interested in the Union and that Santillo had asked for the reasons in writing. Zimmerman affirmed the action of discharge and instructed Patterson not to give Santillo any reasons in writing. After the phone call, Patterson informed Santillo that he should leave the premises immediately and that he was officially fired. Santillo replied that he was not going to let this rest and that he planned on fighting the action. Patterson then added, "By the way this has nothing to do with the Union." As Santillo was leaving, Van Horn said to Patterson that he thinks that Respondent was nuts or crazy for letting Santillo go at that point in time, because of the Union meeting that night as they would make a "mountain" out of Mr. Santillo.[7]

Patterson explains that the main reason for his decision to terminate Santillo was Santillo's alleged "stealing time," and that the failure to put his keys on the rack was a subsidiary additonal reason for his action.

The stealing time allegation relates to the practice engaged in by Santillo of taking a coffee break in the mornings while between routes, and Santillo's stopping at his house for about 15 minutes per day on the way back to the garage before reporting in and punching out. Since Santillo was on the clock and being paid for

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[7]The above remarks of Van Horn are based on the testimony of Santillo which I credit since they were undenied by Patterson and Van Horn did not testify. Patterson denied that he brought up the fact that the discharge had nothing to do with the Union, but states that Santillo brought the subject up and he merely denied it. I credit Santillo on this point. In addition to demeanor considerations, I rely upon the fact that Van Horn also mentioned the discharge at the time, in connection with the Union and Santillo's activities on its behalf.

the times that he was taking a coffee break and stopping at his house, Patterson testified that he considered this conduct to be stealing time from Respondent by Santillo. The facts are not in dispute that Santillo did in fact take a coffee break every morning, and that he also stopped each day at his home for about 15 minutes before coming into the garage. There is much dispute, however, with respect to Company policy and warnings concerning these areas.

Patterson asserts that sometime in November 1978 he spoke to Santillo about taking coffee breaks, after he had received a complaint about it from Mr. Maloney of the School Department about Santillo stopping while children were on his bus to buy coffee. According to Patterson he told Santillo at that time that he should not be taking coffee breaks and that Santillo responded that he did not know it was wrong and promised not to do it again. Santillo recalls the conversation, but contends that the discussion only related to Santillo drinking coffee while he was transporting children, and that he agreed not to do this again. However, Santillo denies ever being told then or any time that coffee breaks in general are improper procedure. I credit Santillo's version of this conversation, particularly since Patterson when first asked about this discussion when examined by General Counsel under Section 611(c), of the Federal Rules, testified that the conversation had been restricted to Santillo driving the bus with coffee in his hand.

Santillo testified that he was unaware of any Company rule or prohibition of coffee breaks in general. Employees Nancy Danko, Ed West and Joseph Baer, all testified that they were unaware of any Company rule prohibiting coffee breaks, that they in fact had taken coffee breaks as a matter of course and had seen numerous other employees take such breaks, and had never been spoken to or warned about it by management.

Danko testified in fact, that she had on occasion brought back coffee to Patterson. Further, Respondent's driver information booklet, introduced into evidence, makes no reference to any Company rule regarding coffee breaks.

Employee Lee Holmes testified that he was spoken to about coffee breaks by Patterson, but that Holmes explained to Patterson the reason that there was a problem on his run was not the coffee breaks that he was taking, but due to the number of children on his run. Thereafter Holmes' run was changed and his route was rearranged. Although this change in route did reduce the amount of time Holmes was able to take for coffee breaks, he testified that he did thereafter take some coffee breaks and was always paid for the time during which he took these breaks.

Patterson's testimony concerning Company practice with respect to coffee breaks was confusing and contradictory. Initially, he testified that no coffee breaks were permitted, stating, "They are getting paid to pick up kids, that is what they should be doing." Upon further cross-examination, however, Patterson admitted that in some situations coffee breaks are permitted and in others they are not. Patterson was unable to specify clearly in which situations coffee breaks were authorized. However, he appeared to be saying that coffee breaks are allowed unless they in some way result in an adverse effect on the servicing of the drivers' route. Patterson also testified that when the Company finds out about these unauthorized coffee breaks, the normal practice is to change the drivers' route, or give him more children to pick up, or tell the driver to leave the garage later or simply not to pay the driver for the time spent while on coffee breaks.

I find based on the evidence as summarized above, that the taking of coffee breaks by Respondent's em-

ployees was a common occurrence, and that Respondent's officials knowingly tolerated this activity without question, unless the coffee breaks resulted in the drivers arriving too late or too early at their stops, or otherwise inconvenienced the children being transported. I also find that on those occasions when Respondent discovered that the taking of coffee breaks produced such a result, they would alleviate the situation by changing routes, increasing the number of children to be transported, changing the time a driver would leave the garage, or merely not paying the driver for the time.

With respect to the afternoon stopping by Santillo at his home before going back to the garage, Patterson testified that sometime in late February he received an anonymous call complaining about Santillo's bus being parked every day on Alcorn Drive. Patterson spoke to employees Kelly and Sanderopolis, who live on Alcorn Drive, and confirmed the fact that Santillo had been parking his bus every day for some 15 minutes in the afternoon between 5 p.m. and 5:20 p.m. Patterson testified that he asked Santillo if he was stopping his bus at his home before coming back to the garage, Santillo allegedly denied that he was stopping, and informed Patterson "every minute that bus is out of this garage it is rolling."

Santillo although admitting that he regularly stopped off at his home for 15–20 minutes before returning to the garage, denied ever being spoken to or asked about it by Patterson. Santillo explained that he stopped at his home in order to go to the bathroom. Santillo admitted that he was aware that he was not authorized by Respondent to take the bus home before reporting in, but attempted to justify his actions by pointing out that Respondent failed to pay employees for time spent gassing up before taking the bus out. Thus, in Santillo's mind his stopping at home was to make up for the failure of Respondent to pay him for the gassing up time. I

credit Patterson on the issue of whether Santillo was spoken to about this problem. I find it reasonable that Patterson after finding out about Santillo's behavior would mention it to him. I also find that Santillo denied making these stops because in his mind he was justified in doing so because Respondent unfairly refused to pay him for his gassing up time. I note, however, that Patterson admits and I so find that he at no time confronted Santillo with the confirmation that he had obtained from employees that Santillo was engaging in this conduct, and that he at no time warned Santillo that he would or might be subject to any kind of disciplinary action, much less discharge, if he continued to make these stops at home.

The remaining ground for Santillo's discharge according to Patterson was Santillo's leaving keys in his bus. Patterson asserts that Santillo had a habit of leaving his keys in the bus, and that he (Patterson) had spoken to Santillo about it on a number of occasions and warned him not to leave his keys in the bus. Patterson did not enumerate when these conversations occurred, but testified that he told Santillo that as it was turning to spring, Respondent was leaving the garage opened and that he did not want any of the buses disappearing. Patterson also testified that garage dispatcher Ronald Sulloway warned Santillo about leaving the keys in the bus on Thursday or Friday, March 22 or 23.

Sulloway testified as Respondent's witness, and despite extensive attempts by Respondent's counsel to lead him into corroborating Patterson on this point, denied that he had warned Santillo about leaving keys in the bus on the Thursday or Friday before his discharge. Sulloway testified that he did speak to Santillo 3 weeks before the discharge about leaving keys in the bus. According to Sulloway, Santillo responded by saying that he did not have to listen to Sulloway and Sulloway was the bosses' ass wiper. Sulloway further

testified that he reported to Patterson that he had told Santillo not to leave his keys in the bus anymore, and Patterson replied "O.K., you told him. We'll let it go. If it happens again we'll write him up."[8]

Sulloway further testified that on the day of Santillo's discharge, March 26, he again noticed Santillo leaving his keys in the bus. Sulloway alleges that he told Santillo that he had been warned before about the problem and this time he would have to write Santillo up. Again, Santillo allegedly said, that he did not have to listen to Sulloway. Sulloway alleges that he had reported the matter to Patterson in the morning and Patterson told him to speak to Santillo about it and he did so.

Patterson on the other hand does not mention Sulloway reporting this problem to him on the 26th or even discussing the matter with him on that date. Patterson testified that while Santillo was out on his morning run he made up his mind to discharge him, and that he intended to inform him when he returned to the garage from his run and brought his keys into the office. However, Santillo left the keys in the bus and went directly home without coming into the office. Therefore Patterson, when he found out that Santillo was not there, called him at home and told him to come in, and informed him of his discharge when he returned to the garage.

Santillo denies ever being warned or spoken to about leaving keys in the bus. Santillo admits that he would leave his keys in the bus while in the garage in between runs, but after his runs were complete he would put the keys on the key rack in the office. He also testified that he has frequently seen other employees leave their

[8] According to Sulloway Respondent has a system of written warnings which are issued to employees, and after three warnings, it is cause for dismissal. Patterson denied that Respondent has any kind of system of written warnings.

keys in the bus. Nancy Danko testified, that she would leave her keys in the bus from time to time and that she was never spoken to about it or made aware by Respondent officials that there was any rule against it.

I credit Santillo that he was never warned about this alleged problem and that there is no established Company rule prohibiting such conduct. Danko substantially corroborates Santillo's testimony, while the testimony of Sulloway and Patterson is filled with contradictions and inconsistencies on the subject.[9]

Patterson testified at length concerning this decision to discharge Santillo. He alleges that when Santillo in late February denied that he was stopping at home on the way back to the garage, he was suspicious and skeptical of such denials. Thus, he ordered a new tacograph to be placed in Santillo's bus, which would measure the amount of time that his bus was in operation and when it was stopped. The new tacograph was installed in his bus on March 12.[10]

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[9]Thus, Patterson testified, that Sulloway warned Santillo about leaving his keys in the bus on the Thursday or Friday before the discharge. Sulloway denied issuing such a warning but claims that he warned Santillo about 3 weeks before. Sulloway also testified that he noticed Santillo's leaving the keys in the bus on the day of his discharge (March 26), reported it to Patterson, who told him to speak to Santillo about it. Patterson makes no mention of this incident, and claims that he made up his mind to discharge Santillo before finding out his keys were left in the bus on the 26th. Moreover, Sulloway testified that in both conversations relating to this subject he talked about issuing warning notices to Santillo in connection with Respondent's system of three written warnings before a dismissal. Patterson denies that Respondent has any system of written warnings prior to dismissal.

[10]The installation of tacographs on buses is not an unusual procedure. In fact most other buses contained such an instrument and Santillo's bus itself contained a tacograph but it was not properly functioning.

The first week's reading according to Patterson measured only two days of the week. Although these 2 days demonstrated that Santillo had been taking breaks and stopping at home, Patterson did not take any action against Santillo, as he asserts that the graph was still incomplete. When asked why he did not bring the initial readings to Santillo's attention, Patterson testified at first that he was looking for evidence to fire him. Patterson then after being asked if he had determined to fire Santillo, answered, "No, I had determined to confront him with both his denials of the stops and the tacograph readings."

Patterson further testified that on Friday, March 23, he reviewed the tacographs and discovered gaps in time of 15 minutes in the morning and 15 minutes in the afternoon. According to Patterson it was in his mind at that time to discharge Santillo, but he had not finally made the decision. On Saturday, Patterson was in the office, but asserts that he did not look at the tacograph on that day. When asked why he did not do so, his response was that it did not occur to him on Saturday. On Monday, March 26, Patterson claims, that as part of his regular routine of reading all the tacographs, he read Santillo's graphs. He then discovered that for the previous week, Santillo actually worked 6 hours per day, while putting it for 6½ hours per day. This confirmation of the fact that Santillo was "cheating" on his time according to Patterson persuaded him that Santillo should be immediately discharged. He claims that he discussed the matter with supervisor Van Horn and his girlfriend, and they both concurred that Patterson should be discharged.[11] Patterson denied that he

[11] According to Patterson, his girlfriend had worked with Santillo for 2 years and she knew Santillo and what was going on. Her opinion allegedly was that Santillo should have been fired long ago.

consulted with Zimmerman or any other superiors in the main office or elsewhere about his decision to terminate Santillo.

B. *Concluding Findings*

1. 8(a)(1) Allegations

The evidence establishes that Respondent engaged in several violations of Section 8(a)(1) of the Act as alleged in the Complaint.

The statements made by Patterson to Baer, that he (Patterson) heard that Santillo started the Union, that Santillo was two faced, and that he was going to get even with Santillo, constitute unlawful threats of reprisals as well as create the impression of surveillance of employees' Union activities.

Respondent urges with respect to these remarks, that the evidence is not clear that the "getting even" referred to any Union activity and that it concerned a private situation between Santillo and Patterson not relating to Company granted privileges. Although Baer's testimony does indicate that the subject of Santillo having attempted to date Patterson's girlfriend did arise in their conversation in connection with Patterson getting even with Santillo, it is also clear that Patterson did say that Santillo started the Union, was two faced and Patterson was going to get even with him. The fact, that Patterson did not testify concerning this conversation, further reinforces my belief, that the "getting even" remarks did relate at least in part to the Union activities of Santillo and I so find.

Having so concluded, such a remark has been held to be a direct and unambiguous threat by a man who could deliver on it, and constitutes a violation of Section 8(a)(1) of the Act.[12]

[12]*Goodyear Aerospace Corporation*, 234 NLRB 539; See also *E. Mishan & Sons Inc.*, 242 NLRB 147; *Richard Tischler, et*

Respondent contends that the record is devoid of any evidence to sustain the allegation in the Complaint concerning Respondent creating an impression of surveillance of Union activities. I disagree. Patterson's remark to Baer that he heard that Santillo started the Union, reasonably tends to impress upon employees that the Company maintains surveillance of Union activities of said employees, including possibly his own, and constitutes a violation of Section 8(a)(1) of the Act.[13]

Patterson's comments to West, after ascertaining from West that Santillo was interested in the Union, that he would "remember" Santillo's Union activities, when Santillo asks him again for certain favors that Patterson had granted to Santillo, I find to be implied threats of reprisals in violation of Section 8(a)(1) of the Act.

Respondent contends again that the matter concerns a private matter between Patterson and Santillo, not involving Company granted privileges. However, the evidence is to the contrary, as one of the favors mentioned by Patterson was his practice of permitting Santillo to leave early from his job, in order to enable Santillo to be present at his other job running a Fair stand. Thus, I find, Patterson has threatened to withdraw his previously granted privilege to Santillo of adjusting his work schedule to accommodate his other job, in reprisal for his Union activities, in violation of Section 8(a)(1) of the Act.[14]

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al. d/b/a Devon Cables Lodge and Apartments, 237 NLRB 107; *Pittsburgh Press Co.*, 234 NLRB 408.

[13] *Jim Baker Trucking Company*, 241 NLRB 14; *Brown Mfg. Co.*, 235 NLRB 189; *James Innaco d/b/a Skyline Transport*, 228 NLRB 352; *Commerce Concrete Company Inc.*, 197 NLRB 658; *American National Shoes Inc.*, 195 NLRB 127.

[14] *Vincent's Steak House Inc.*, 216 NLRB 647.

Moreover, I find, that Patterson's implied threat to withdraw his permission for Santillo to park his personal truck in Patterson's driveway is also violative of the Act, even though not involving Company related privileges. Although Section 8(a)(3) of the Act requires discrimination in employment in order for the action to be violative of the Act, Section 8(a)(1)'s prohibition of restraint and coercion does not require that the restraint or coercion relate to a term or condition of employment. As long as the threat is found to be in reprisal for an employee's union activities, such a threat is a violation of Section 8(a) (1) of the Act.[15]

Although Patterson admits interrogating employees concerning their Union activities, Respondent contends that these incidents were isolated, casual and friendly in nature and should not be found violative of the Act. I conclude on the contrary, that Patterson's questioning coupled with the unlawful threats of reprisals and statements creating the impression of surveillance, were far from casual, isolated or friendly, and constitute coercive interrogations in violation of Section 8(a)(1) of the Act.

2. Discharge of Santillo

The evidence establishes a strong *prima facie* case of discrimination against Santillo because of his Union activities. All of the elements necessary for the finding of a violation are clearly present. Thus, Santillo was one of the prime organizers for the Union, and Respondent

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[15]See for example *Harold Jackson d/b/a Truck and Trailer Service*, 239 NLRB 137, where a threat to evict an employee from a house rented from a principal of the Employer, was found to be a violation, although the rental was not a Company related privilege. See also *Kent Brothers Transportation Co.*, 188 NLRB 53, and *E.M. Mishan, supra*, where threats of bodily harm to Union instigators were found to be violative of the Act.

was aware of this fact.[16] In addition, Respondent while asking about Santillo's Union activities, and creating the impression of surveillance of employees' union activities, called him two faced, said that he was taking it personally, threatened that he would "get even" with Santillo and threatened to withdraw favors he had previously been granting to Santillo. Thus, anti-union animus has clearly been established. Finally, the timing of the discharge on March 26, coming on the next working day after the unlawful threats described above, and on the very day that a Union meeting was scheduled for that evening and where Respondent was aware of the meeting being scheduled by virtue of having read the leaflets distributed by Union officials on that day to employees announcing the meeting, is highly indicative of a discriminatory motivation.

Respondent's asserted reasons for the discharge of Santillo fail to withstand scrutiny, and further tend to reinforce the conclusion that Santillo's discharge was unlawful. Santillo's having left his keys in the bus is clearly a pretextual reason, as by Patterson's own testimony he had made up his mind to discharge Santillo before finding out that he left his keys in the bus, on the 26th, and the practice of leaving keys in the bus I have found to be common practice at Respondent. Moreover, as noted above, the record reveals serious inconsistencies between the testimony of Company officials, Patterson and Sulloway on this subject.

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[16] Respondent's contention that Patterson although aware that Santillo was a Union supporter, was not aware of his leadership role in the Union is contradicted by the evidence of record. It is undisputed that Patterson told Baer that he heard that Santillo started the Union, and that he asked West "what's with Sam and the Union" and West confirmed Santillo's leadership role in the Union. Accordingly, it is clear that Patterson was fully aware that Santillo was a leader of the union organizing drive among its employees.

Respondent contends that the primary reason for the discharge was Santillo's alleged "stealing of time," by virtue of his unauthorized coffee breaks and his stopping off at his home before reporting into the garage. There is no question that Santillo was taking coffee breaks and stopping at his home before coming in. I have found, as noted, that the taking of coffee breaks by employees was normal practice, and that Respondent tolerated this practice without taking any kind of action unless the breaks interfered with a driver's route being properly performed. Moreover, I have found that in situations where such coffee breaks have resulted in such an effect on a driver's route, that Respondent would take such actions as changing a driver's route or the time that he left the garage, increasing the amount of children to be delivered, or simply not paying the driver for this "unauthorized" time. In no case does the record reveal a discharge, suspension or any other kind of disciplinary action taken against employees for engaging in such conduct.

Although, an argument can be made that Santillo's stopping at home before coming back to the garage can be differentiated from the taking of coffee breaks, and is a more serious transgression, I note that Respondent considered this conduct to be but another example of Santillo's taking unauthorized breaks and alleged "stealing" of time.

I deem it significant that even in Patterson's version of the facts that he never cautioned or admonished Santillo that his taking coffee breaks or his stopping at home, might lead to his dismissal or any other disciplinary action. Such an action on the part of an Employer is not natural and the failure to issue such a warning is indicative of discriminatory motivation.[17] In fact,

[17] *Savin Business Machines Co.*, 242 NLRB 82; *Laredo Packing Co.*, 241 NLRB 24; *Lamment Industries Inc.*, 229 NLRB

Patterson's own testimony also establishes that when he first became aware of the tacograph's establishing that Santillo was stopping at home in the evening, (before his Union activities) he had not determined to fire him, but had determined to confront him with both his denials of the stops and the tacograph readings. Yet when the tacograph readings in the next week further confirmed Santillo's stopping at home, (after his Union activity), Patterson did not as he intended to do, confront Santillo with his evidence, nor warn him of future disciplinary action. He also did not take any of the actions normally taken by Respondent when unauthorized breaks were found to have affected drivers' runs, such as changing routes, or times or increasing the number of children or not paying the driver for the time.[18]

Moreover, Respondent's own witness and garage dispatcher Sulloway, testified that the Company utilized a procedure of three written warnings before discharge. Yet no such written warnings were ever issued to Santillo. This further tends to buttress my conclusion that prior to the Union activities of Santillo, Respond-

---

895; *The May Department Co., d/b/a The May Company*, 220 NLRB 1096.

[18]There was no probative evidence presented that any of Santillo's unauthorized time resulted in any detriment to the drivers' runs. Patterson on cross-examination for the first time mentioned that his reading of the tacograph revealed that Santillo had been dropping some children off early. However, Patterson admitted that no complaints were received about Santillo doing this, and that he never had any discussions with Santillo about this subject. I find that this was but a contrived attempt by Patterson to establish that Santillo's breaks were in fact having adverse effect on his route. In any event even if Patterson's testimony were to be credited in this regard, as noted Respondent's normal procedures in these circumstances were not followed.

ent did not consider his conduct so serious as to warrant his discharge.[19]

I conclude that a preponderance of the evidence establishes that Patterson's decision to discharge Santillo on March 26, was in furtherance of his threat made on March 23 to get even with Santillo for his Union activities, and was motivated by a desire to discourage union activities in violation of Section 8(a)(1) and (3) of the Act.

I am mindful of the fact that Santillo did engage in what might be considered unsatisfactory conduct. In other circumstances, it is reasonable to assume that some Employers would consider such conduct to be serious enough to justify discharge. In particular, I refer to Santillo's stopping at home before going back to work while being aware that he was not authorized to do so, and denying to Respondent that he was engaging in such conduct. However, I am persuaded that based on the record as a whole, the evidence is sufficient to establish that this Respondent would not have fired Santillo, one of his most experienced employees, but for his Union activities, but rather would have confronted him with Respondent's evidence, (as Patterson testified that he intended to do), warned him of possible future discipline, and/or taken any of the actions normally taken by Respondent where unauthorized breaks were discovered.[20] Therefore, Respondent has violated Section 8(a)(1) and (3) of the Act.[21] [Footnote 21 is on page 40a.]

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[19] *Keller Mfg. Co.*, 237 NLRB 94.

[20] Respondent places great reliance upon the fact that Patterson ordered the tacograph placed in Santillo's bus prior to his engaging in any Union activities. However, the record re-

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their activities on behalf and their support for the Union.

4. Respondent has violated Section 8(a)(1) of the Act by creating the impression among its employees that Respondent has engaged in surveillance of their union or other concerted activities.

5. Respondent has violated Section 8(a)(1) of the Act by threatening employees that it would get even with employees, or withdrawing privileges or favors previously granted to employees, because of its employees' activities on behalf of and support for the Union.

6. Respondent has violated Section 8(a)(1) and (3) of the Act by discharging and refusing to reinstate its employee, Sam Santillo because of his activities on behalf of and support for the Union.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

---

veals that it was not an unusual procedure to have such instruments in buses. In fact, most of Respondent's buses contained tacographs and in fact Santillo's bus also had such an instrument, but it was not working properly. Although, it is clear that Patterson was disturbed by Santillo's behavior prior to his Union activities, I conclude that his leadership role in the Union triggered Patterson's decision to terminate him on March 26, without confronting him with evidence of his malfeasance, warning him of possible discipline, or taking other action normally taken by Respondent in similar circumstances.

[21] *Keller Mfg. Co., supra; Savin Business Machines Co., supra; Laredo Packing Co., supra; Adams Delivery Service Inc.*, 237 NLRB 140; *Coletti's Furniture* v. *N.L.R.B.*, 550 F.2d 1292, 94 LRRM 3071 (C.A. 1, 1977).

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a) (1) and (3) of the Act, I shall recommend that it cease and desist from engaging in such unfair labor practices and take certain affirmative action provided in the recommended Order below, designed to effectuate the policies of the Act.

Respondent will be required to offer Sam Santillo immediate reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges. I shall further recommend that the Respondent make Santillo whole for any loss of earnings he may have suffered by reason of the unlawful discharge, with backpay to be computed on a quarterly basis, making deductions for interim earnings, and with interest to be paid on the amounts owing and to be computed in the manner prescribed in *F.W. Woolworth Company*, 90 NLRB 289 (1950) and *Florida Steel Corporation*, 231 NLRB 651 (1977).[22]

Upon the foregoing findings of fact, conclusions of law and the entire record pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[23]

ORDER

Transportation Management Corp., its officers, agents, successors and assigns, shall:

---

[22] See generally, *Isis Plumbing & Heating Co.*, 139 NLRB 716.

[23] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Discharging or otherwise discriminating against its employees because of their activities on behalf of and support for the Union or any other labor organization.

(b) Interrogating its employees regarding their activities on behalf of or support for the Union or any other labor organization.

(c) Creating the impression among its employees that Respondent is engaged in surveillance of their Union or other concerted activities.

(d) Threatening its employees that it will get even with employees, or withdrawing privileges or favors previously granted to employees, or otherwise retaliating against its employees, because of its employees' activities on behalf of or support for the Union.

(e) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.:

(a) Offer to Sam Santillo immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve, and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payroll records, timecards, personnel records and reports, and all other records necessary, or appropriate, to analyze the amount of backpay due.

(c) Post at its place of business in Springfield, Massachusetts, copies of the attached notice marked

"Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's authorized representative, shall be posted by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of the receipt of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C., February 8, 1980.

/s/ _____

STEVEN B. FISH
Administrative Law Judge

[24] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

FORM NLRB—4727
(9–69) JD–(NY)–4–80

NOTICE TO EMPLOYEES

Posted by Order of The
National Labor Relations Board
An Agency of the United States Government

AFTER A TRIAL IN WHICH ALL SIDES HAD A CHANCE TO GIVE EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED US TO POST THIS NOTICE.

We intend to abide by the following:

The Act gives all employees these rights:

To engage in self-organization;

To form, join, or help unions;

To bargain collectively through representatives of their own choosing;

To act together for collective bargaining or other mutual aid or protection;

To refrain from any or all of these things.

WE WILL NOT discharge or otherwise discriminate against any employees to discourage membership in GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY & HIGHWAY CONSTRUCTION EMPLOYEES LOCAL UNION 404, a/w THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, herein called the Union, or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against our employees because of their activities on behalf of or support for the Union or any other labor organization.

WE WILL NOT interrogate our employees regarding their activities on behalf of or support for the Union or any other labor organization.

WE WILL NOT create the impression among our employees that we have engaged in surveillance of their Union or other concerted activities.

WE WILL NOT threaten our employees that we will get even with employees, or withdraw privileges or favors previously granted to employees or otherwise retaliate against our employees, because of our employees' activities on behalf of or support for the Union.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer Sam Santillo immediate and full reinstatement to his former job and WE WILL compensate him with interest for any loss of pay he may have suffered because we terminated him.

TRANSPORTATION MANAGEMENT CORP.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 99 High Street, Boston, Massachusetts 02110 Telephone No. (617) 223-3313.

Supreme Court, U.S.
FILED
JAN 4 1983
ALEXANDER L. STEVAS
CLERK

No. 82-168

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORP., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(633) 2217

MARTIN AMES
7 Fletcher Street
P. O. Box 251
Chelmsford, Mass. 01824
(617) 256-8115

PETITION FOR CERTIORARI FILED JULY 30, 1982
CERTIORARI GRANTED NOVEMBER 15, 1982

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-168

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORP., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Matter of: Transportation Management Corp.

Board Case No.: 1-CA-15846

Date	*Documents*
3.28.79	Charge Filed
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5.17.79	Answer
9.11.79	Order Advancing Hearing
9.27.79	Teletype scheduling place of hearing
10.4.79 10.5.79	Hearing
2.8.80	Judge's Decision
3.17.80	Exceptions to Judge's Decision
5.20.81	Decision and Order of National Labor Relations Board
4.1.82	Opinion of Court of Appeals
11.15.82	Order Granting Certiorari

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
FIRST REGION

CASE NO. 1-CA-15,846

In the Matter of

TRANSPORTATION MANAGEMENT CORP.

and

GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY & HIGHWAY CONSTRUCTION EMPLOYEES LOCAL UNION 404, a/w THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

COMPLAINT AND NOTICE OF HEARING

It having been charged by General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction employees Local Union 404, a/w The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 549 Chestnut Street, Springfield, Massachusetts (herein called the Union) that Transportation Management Corp., Worthington Street, Springfield, Massachusetts (herein called Respondent) has been engaging in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.* (herein called the Act) the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

1. The Charge in this proceeding was filed by the Union on March 28, 1979 and a copy thereof served upon Respondent on March 29, 1979.

2. Respondent is and has been at all times material herein a corporation duly organizaed under and existing by virtue of laws of the Commonwealth of Massachusetts.

3. At all times herein mentioned, Respondent has maintained an office and place of business at Worthington Street, in the City of Springfield, County of Hampden, and Commonwealth of Massachusetts (herein called the Respondent's Springfield offices), and is now and continuously has been engaged at said Springfield offices in providing transportation services to various local school boards in the Commonwealth of Massachusetts.

4 (a) Respondent, in the course and conduct of its business, causes and continuously has caused at all times herein mentioned, large quantities of gasoline and automotive products used by it in providing transportation services to be purchased and transported in interstate commerce from and through various States of the United States other than the Commonwealth of Massachusetts.

(b) Respondent has annual gross revenues in excess of $500,000.

(c) Respondent annually receives from points located outside of the Commonwealth of Massachusetts goods valued in excess of $50,000.

5. The aforesaid Respondent is and has been engaged in commerce within the meaning of the Act.

6. The Union is a labor organization within the meaning of Section 2(5) of the Act.

7. At all times material herein, the following named person occupied the position set opposite his name and has been and is now an agent of the Respondent, acting on its behalf, and is a supervisor within the meaning of Section 2(11) of the Act.

George Patterson—Terminal Manager

8. Since on or about March 22, 1979 and continuing to date, Respondent has interfered with, restrained and coerced, and is interfering with restraining and coercing its employees in the exercise of their rights as guranteed in Section 7 of the Act, by the following acts and conduct:

(a) On or about March 22, 23, 24 and 27, 1979, Respondent through George Patterson interrogated at its offices and at other locations in the Springfield, Massachusetts area employees concerning union activity.

(b) On or about March 23, 1979, at a location in the Springfield area, Respondent through George Patterson

warned an employee that it would get even with another employee who was active in behalf of the union.

(c) On or about March 27, 1979, at its Springfield offices; Respondent through George Patterson in a conversation with an employee created the impression of surveillance of union activity among its employees.

9. Respondent did on or about March 26, 1979 discharge Sam Santillo employed at its said Srpingfield offices.

10. Respondent has, since the date of discharge listed above in Paragraph 9, failed to, refused to, and continues to refuse to reinstate the employee named above in Paragraph 9, to his former or substantially equivalent position of employment.

11. Respondent did discharge and refuse or fail to reinstate the employee named above in Paragraph 9, for the reason that he joined or assisted the Union, or engaged in other concerted activities, for the purposes of collective bargaining, or other mutual aid or protection.

12. By the acts described above in Paragraphs 9 and 10, carried out for the reason set forth in Paragraph 11 above, Respondent did discriminate and is discriminating in regard to the hire or tenure or terms or conditions of employment of the employee named above in Paragraph 9, thereby discouraging membership in the Union, and Respondent thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

13. By the acts described above in Paragraphs 8, 9 and 10, and by each of said acts, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

14. The activities of Respondent, described above in Paragraphs 8, 9 and 10, occurring in connection with the operations of Respondent, described above in Paragraphs 3 and 4, have a close, intimate, and substantial relation to trade, traffic and commerce among the several Sates and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

15. The acts of Respondent, described above, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 20th day of February, 1980, at 10 o'clock in the forenoon, Eastern Standard Time, and consecutive days thereafter until concluded, at a place to be determined in Springfield, Massachusetts, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668 Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practices Cases, is attached.

You are further notified that, pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

WHEREFORE, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the First Region, on this 9th day of May, 1979, issues this Complaint and Notice of Hearing against Transportation Management Corp., Respondent herein.

/s/ Robert S. Fuchs

ROBERT S. FUCHS, *Regional Director*
National Labor Relations Board
First Region
Boston, Massachusetts

IMPORTANT NOTICE

The date which has been set for hearing in this matter should be checked immediately. If there is proper cause for not proceeding with the hearing on that date, *a motion to change the date of hearing should be made within ten (10) days from the service of the Complaint.* Thereafter, it will be assumed that the scheduled hearing date has been agreed upon and that all parties will be prepared to proceed to the hearing on that date. Later motions to reschedule the hearing generally will not be granted in the absence of a proper showing of unanticipated and uncontrollable intervening circumstances.

All parties are encouraged to fully explore the possibilities of settlement. Early settlement agreements prior to extensive and costly trial preparation may result in substantial savings of time, money and personnel resources for all parties. The Board agent assigned to this case will be happy to discuss settlement at any mutually convenient time.

Be assured that your cooperation in this, as well as other matters of mutual interest, is greatly appreciated by me, my staff, and the Agency.

/s/ Robert S. Fuchs

ROBERT S. FUCHS, *Regional Director*

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
FIRST REGION

CASE NO. 1-CA-15,846

In the Matter of

TRANSPORTATION MANAGEMENT CORP.

and

GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY & HIGHWAY CONSTRUCTION EMPLOYEES LOCAL UNION 404, a/w THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ANSWER

1. Respondent admits the allegations of paragraph 1 of the Complaint.

2. Respondent admits the allegations of paragraph 2 of the Complaint.

3. Respondent admits the allegations of paragraph 3 of the Complaint.

4.a. Respondent is without knowledge or information sufficient to form a belief as to the allegations of paragraph 4.a. of the Complaint.

4.b. Respondent admits the allegations of paragraph 4.b. of the Complaint.

4.c. Respondent admits that it receives goods valued in excess of $50,000 from points located outside the Commonwealth of Massachusetts indirectly but denies receiving same directly.

5. Respondent admits the allegations of paragraph 5 of the Complaint.

6. Respondent admits the allegations of paragraph 6 of the Complaint.

7. Respondent denies that George Patterson occupies the position of "Terminal Manager." Except as specifically denied, Respondent admits the allegations of paragraph 7 of the Complaint.

8. Respondent denies the allegations of paragraph 8 of the Complaint.

9. Respondent admits the allegations of paragraph 9 of the Complaint.

10. Respondent admits the allegations of paragraph 10 of the Complaint and states that the discharge of Sam Santillo was lawful and Respondent therefore has no obligation to reinstate said employee.

11. Respondent denies the allegations of paragraph 11 of the Complaint.

12. Respondent denies the allegations of paragraph 12 of the Complaint.

13. Respondent denies the allegations of paragraph 13 of the Complaint.

14. Respondent denies the allegations of paragraph 14 of the Complaint.

15. Respondent denies the allegations of paragraph 15 of the Complaint.

Attorney for Respondent

/s/ C. Fred Welensky

C. FRED WELENSKY
One Faneuil Hall Marketplace
Boston, MA 02109
(617) 367-6363

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
FIRST REGION

CASE NO. 1-CA-15,846

In the Matter of:

TRANSPORTATION MANAGEMENT CORP.

and

GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY & HIGHWAY CONSTRUCTION EMPLOYEES LOCAL UNION 404, a/w THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Old Superior Courtroom
Hampshire County Court House
99 Main Street
Northampton, Massachusetts
Thursday, October 4, 1979

The above-entitled matter came on for hearing, pursuant to Notice, at 10:00 o'clock a.m.

BEFORE:

Honorable Steven B. Fish, Administrative Law Judge

APPEARANCES:

THOMAS P. KENNEDY, Esq.,
Keystone Building,
99 High Street
Boston, Massachusetts,
appearing as Counsel for the General Counsel.

C. FRED WELENSKY, Esq.,
One Faneuil Hall Market Place
Boston, Massachusetts, 02109;
appearing on behalf of the Respondent.

[6] MR. KENNEDY: They are.

MR. WELENSKY: We stipulate that George Patterson is Respondent's manager of its Springfield facility, and that Russell vanHorn, who was employed at the time of Mr. Santillo's discharge, was then supervisor.

MR. KENNEDY: That is understood that both Mr. Patterson and Mr. vanHorn are supervisors within the meaning of the Act.

MR. WELENSKY: Yes.

JUDGE FISH: Those stipulations are received.

[7] SAM SANTILLO

was called as a witness by and on behalf of Counsel for the General Counsel and, having been first duly sworn was examined and testified as follows:

Q. (by Mr. Kennedy) Mr. Santillo, were you previously employed by Transportation Management at its Springfield, Massachusetts location?

A. Yes, sir.

Q. When did you start there?

A. October of '76.

[8] Q. And you were discharged from that?

A. March of '79.

Q. What day in March, do you recall?

A. Yes, March 26.

Q. That was a Monday?

A. Yes, sir.

Q. What was your job there?

A. School bus driver at that point. When I was discharged I was a half bus driver, driving one of the biggest buses they have.

Q. It was a half bus?

A. They call them half buses.

Q. At the time of your discharge approximately how many drivers were there at the Springfield location?

A. At least 70, that's a guess, though, but I would guess 70.

[9] Q. Directing your attention to March 19, 1979, that is a Monday. Did you go to the Teamsters Local 404 union hall on that day?

A. Yes, sir, I did.

Q. Did you go alone?

A. No, sir, I didn't. There was me and another employee, John Walker.

Q. What reason did you go there?

A. Prior to going there there was a few employees, in fact, more than a few were complaining about different things that they were upset over. Some of the complaints I

heard was time from leaving their home to pick up a child was non-paid—

[10] THE WITNESS: There was a few employees who complained about gassing up on their own time, picking up children—at that time going to pick up the child was non-paid, there was different complaints about benefits, different little things they were complaining about.

Q. With whom did you speak when you went to the hall?

A. I talked to two business agents. One was Eddie Lymon and John Adamski.

Q. Did you sign an authorization at the hall that day?

A. Yes, sir, I did.

Q. What did you discuss with the business agents?

A. I just went there and asked them if it was possible that they could send one of their people down to the garage to talk to the drivers. There were some drivers there that wanted some information about perhaps getting a union into the garage.

Q. After you left the hall what did you do that day?

A. I went home and ate and then I had an afternoon run. I talked to some of the drivers, maybe six or seven drivers I might have talked to that afternoon.

Q. What did you say to them?

A. Right at the garage.

Q. On the next day, Tuesday, March 20, do you recall what [11] you did on that day?

A. Yes. In talking to the drivers the previous day, some drivers showed an interest, so I went back to the hall the following day and picked up some cards.

Q. How many cards did you pick up?

A. 50 or 60, I'm not sure.

Q. Did you go alone or did you go with Mr. Walker?

A. No, sir, I went alone that time.

Q. What did you do with these cards, and what did you do about the union after that?

A. Well, I went back and talked to some of the drivers about—what it was was an authorization card, and I talked to some of the drivers about signing the cards and perhaps that we would get someone to sit down and talk to us.

Q. And where did you do this?

A. At the garage. I talked to some drivers after my run was over out in the parking lot, and then I talked to a cou-

ple who live in my surrounding area. I talked to a couple of them.

Q. Now directing your attention to 6 p.m. on Friday, March 23, 1979, did you have a phone conversation with George Patterson at that time?

A. Yes, sir, I did.

Q. By that time how many employees had you talked to [12] about the union, by the time you had received this call?

A. I had talked to at least 30, maybe 35 or 40 drivers I talked to by then.

Q. Did you call Mr. Patterson or did he call you?

A. No, sir, I called him.

Q. Would you tell us what the purpose of this call was?

A. Sitting home Friday night Mr. Ed West, who also worked for TMC at the time, who also resides with me, come home and told me that Mr. Patterson was upset over what I was doing and he was taking it personally.

At that point in time I considered George a friend of mine. I didn't want to upset him. I didn't want him to think I was coming on strong against him, so I called him.

My words to him were, "George, I wish you wouldn't take it personally but it's really between the company, the union and TMC, that's it. I think you and I are out of the picture. I wish you wouldn't take it, it's nothing to do against you."

[13] Q. Can you recall anything else being said by him?

A. He did say to me, he says, "Well, lookit, when you come in Monday morning I am going to have to pretend in front of the other people that I am mad at you."

And he also related to me, he says, "By the way, this call never took place."

I said, "Okay, George."

Q. Directing your attention to the next day, Saturday, March 24, 1979. What did you do on that day?

A. I arranged a meeting for Monday, the 26th—not a union meeting, but a meeting of the drivers. So I proceeded to call every driver. I called them all. I must have spent four hours on that phone calling drivers.

Q. How many drivers would you estimate you spoke to?

A. At least 70 again, sir.

Q. And you told them what?

A. I didn't go into detail. All I told them was there [14] was a meeting being held, I think it was 6 o'clock that

night, March 26 on the Monday, if you could please be there, and I gave them the address.

Q. Where was that?

A. I forget the number but it was Chestnut Street, Local 404, at the hall. I forget the name of it.

Q. At the Teamster hall?

A. At the Teamsters hall, yes, sir.

[15] Q. And when you got home did you receive a phone call from someone?

A. Yes, it was George saying, "Could you please come back in? I want to talk to you." At that time I asked him, I said, "I just got home. Whatever it is, can we talk about it over the phone? I just got home."

He said, "No, it's pretty important. You have to come in."

[16] Q. What did you do then?

A. I went to see Mr. Patterson at his office.

Q. Who was there?

A. George Patterson was there obviously, and Mr. Russell vanHorn was sitting at the other desk, those two people.

Q. In Mr. Patterson's office?

A. In the office. There was other people outside of the office, but in the office with Mr. Patterson and Mr. vanHorn.

Q. Was the door open or closed?

A. It was open when I came in, then he closed it.

Q. What was said at this time?

A. I sat down and George, the first thing he said to me was, "How many times have I warned you about leaving keys in the bus?" I wasn't quite sure what he meant but right away it come to my mind that perhaps my keys [17] were left in the bus when there were kids in the bus. I said, "Never," I said, "that's no problem, I never leave my keys in the bus."

Q. With children on the bus?

A. While I am delivering children.

He says, "I've warned you before about leaving keys on the bus."

I said, "George, you haven't. I never heard that before." I said, "Besides, I know better, I never leave my keys in the bus. I know it's an obvious thing."

He said, "You left the keys in the bus this morning.

I said, "When?"

He said, "When you parked the bus in the garage."

I said, "What? You're kidding." I said, "That's a common thing. The keys are left in the bus, if someone wants to pull it out, it's there." I said, "I don't believe this."

Then he dropped that subject anyways and he says, "Well, how many times have I told you about taking coffee breaks?" I said, "George, never, that's another common thing, coffee breaks are taken by me and by other drivers also." I said, "This is a brand new game to me about coffee breaks."

Now there was one incident that George did call me [18] in the office and talked to me about coffee break—well, it wasn't about a break. At that time, I think it was in December of '78 the bus was empty, I already delivered the kids and was getting ready to pick up the next busload of kids.

And we were waiting and my monitor got me a cup of coffee. I had the coffee in my hand, I started the bus and I went to the school to pick up the kids. The coffee was not drunk yet, there was still coffee left.

The kids got on the bus, I still hadn't finished the coffee and I must have delivered two or three kids with coffee and then the cup was finally empty and it was put away.

Anyway, George called me in and says, "Sam, it's not right." Well, I had a tendency to agree with him, for safety purposes. I said, "Okay, George, it will never happen again. I won't drink coffee while I am delivering kids."

As far as warnings about coffee, that's the extent of it.

Q. Continue with the conversation with Mr. Patterson.

A. He proceeded to ask me how many times I was warned about coffee breaks and I says, "Never."

At this point in time he seemed very nervous, to me he did. I mean, that's my own opinion. He seemed nervous. [19] He said, "Well, we are going to have to let you go."

And I got upset, I said, "George, you mean you are firing me?"

He said, "Yeah."

I said, "I want to know right now, George, is that coming from you or the guy upstairs?"

Q. The guy where?

A. That's the words I used, the guy upstairs. In other words, his boss.

He said, "I've got no control over this," he said, "But if you want to leave the office for five minutes, leave, and

come back in," which I did. I left the office and he closed the door.

That office is not soundproof. You don't have to talk very loud to hear what is going on. I did hear George on the phone, to who he was talking I don't know. I do not know who the person was on the phone. But he mentioned, "Sam's here. Sam did leave the keys in the bus, his tach does show that he stopped for coffee or he stopped the bus," and that's all I heard clearly.

Q. Did he identify you as Sam Santillo?

A. No, sir, he used my name "Sam".

Now I have to make a point. I think at that time I am the only Sam employed there, but anyway he did not use Sam Santillo, Just "Sam is here."

[20] Q. And then what happened?

A. Then he says, "You can come back in?" Now he seemed sterner, stronger.

He says, "You are hereby officially fired, you are hereby to get off the premises and never return." Which at that point in time I told you, I says, "I am not going to let this rest." I said, "I plan on fighting this."

I told him that I thought he was wrong, I think it's wrong for letting me go.

Oh, in this conversation while he was firing me, he did mention to me, "By the way, this was nothing to do with the union." He used those words.

Q. Was this before he made the phone call or after?

A. I'm really not sure. I hate to make a statement when I am not sure. He did make a statement, though, anyways we were in the process now of me walking out and it's all over with when Mr. vanHorn mentioned to George, he said, "I think they're nuts—I think he's nuts" or crazy or something like that, "for letting him go at this point in time because of the union meeting being held tonight. They are going to make a mountain out of Mr. Santillo."

Q. When he said, "I think he's nuts", who was he referring to?

[21] A. I'm guessing again—

MR. WELENSKY: I am going to object to the question.

Q. Was he referring to you?

A. No.

MR. WELENSKY: I object to the question.

JUDGE FISH: What is the objection?

MR. WELENSKY: He is asking who Mr. vanHorn was referring to.

JUDGE FISH: I'll sustain the objection. The statement will speak for itself. He doesn't know who he was referring to.

MR. KENNEDY: Excuse me, Your Honor. I was just trying to establish he was not referring to Mr. Santillo. There was only three people in the office—Mr. vanHorn, Mr. Patterson and Mr. Santillo.

The witness' testimony was Mr. vanHorn said, "he's nuts." I wanted to establish the only two people he could be referring to are—well, Mr. Santill or somebody else. That is all I was trying to establish.

JUDGE FISH: You can't establish that by asking his opinion on who he was referring to. You ask him what the statement was, and it is my business to judge who he was referring to.

Q. (by Mr. Kennedy) Continue with what Mr. vanHorn [22] said.

A. That was about the extent of it.

JUDGE FISH: Would you repeat again what he said.

THE WITNESS: He said, "I think he's nuts for letting him go at this point in time because there is going to be a union meeting held tonight,"—and how they knew about that, they knew—

JUDGE FISH: Just the conversation.

THE WITNESS: "He's nuts, don't let him go now. There's a union meeting being held tonight and they are going to make a mountain out of Mr. Santillo." Those are the words.

JUDGE FISH: Continue.

Q. (by Mr. Kennedy) When, if any time, other than the incident you related involving the coffee in your hand while driving the bus, were you ever spoken to by management about coffee breaks, either told a rule about it or rebuked about it or anything?

A. Not to my recollection, Mr. Kennedy.

Q. You were never told, other than that?

A. Never.

Q. What coffee breaks do you take?

A. I took one in the morning in between runs, and then there was an afternoon runs. I would take one between runs there in the afternoon. And then I had an [23] after-

noon run which consisted of—well, it was an additional run, and I took one then.

Q. that was the run into Chicopee?

A. Yes, the one in Chicopee. But to call it a coffee break, you can u-e those terms, but what it was was a bathroom break.

Q. What would you do?

A. The run went right by my house. I would stop the bus and run into the house and I would go to the bathroom. I probably spent all of 10 minutes, I don't know. I didn't keep track of the time.

Q. The coffee breaks you took in the morning and in the [24] afternoon, how long were they?

A. Oh those were 10 minutes, those I know.

[27] From Springfield get on 291 and shoot into—I forgot the name of the school but it's a school in Chicopee and these were older people, retired people that worked this job. I used to go there arriving around four, I think they got out at 4:10, it was pretty close to when I got there and when they got out and I would take them home, each house, and drop them off.

When my last child was dropped off it was right around the corner from my house, and I would stop my bus and pull the key and go into my house and go to the bathroom. I could testify I know I spent at least 10 minutes there, I know I did, at my house.

And I used to get back in the bus and go back to Transportation Management, once again park the bus in any open hole I see and off I went to my home.

[29] Q. Have you seen other drivers leave keys in their buses [30] within the garage?

A. Sure. I never check it but I have seen it, yes.

Q. And this is in the garage itself?

A. Yes, sir.

Q. And that is where you had the habit of leaving the keys in the ignition at the end of your run, in the garage itself?

A. Yes, sir.

Q. Were you ever told prior to your discharge not to do this?

A. Never.

CROSS-EXAMINATION

Q. (by Mr. Welensky) Did you give a signed statement to any representative of the National Labor Relations Board concerning this matter?

A. I am not quite sure what you mean.

Q. Did you ever make an affidavit, give a signed statement to anybody from the NLRB?

A. Sure.

MR. WELENSKY: May I have it?

MR. KENNEDY: Let the record show I am turning over one affidavit of Sam Santillo.

[31] Q. Did you have a bus that was regularly assigned to you for say the last few months prior to your discharge? Did you have the same bus pretty much every day?

A. Yes, sir.

Q. And what bus was that? Did it have a number?

A. Yes, B-219.

Q. And did you have the same route the last three months of your employment?

A. Yes, sir.

Q. Do you kno when the working tachograph was put in the bus just prior to your discharge?

A. A week to two weeks maybe before.

[32] Q. A week or two weeks before?

A. Yes, sir.

Q. Was it put in prior to any union activities by you.

A. Yes, sir, that's right.

Q. So the tachograph as put in prior to your engaging in union activities, right

A. I believe so, sir, yes.

Q. In fact, isn't that what you aid in the statement that you gave to the NLRB, that that new tachograph was put in prior to your union activity?

A. Yes, sir.

Q. And you were paid $6.15 an hour, is that correct?

A. Yes, sir.

Q. Isn't that the same rate that is paid to all the drivers in Springfield?

A. According to bus size.

Q. For everybody driving the same size bus you drove got $6.15 an hour?

A. Yes, sir.

Q. So you weren't getting $6.15 an hour as a merit, there was no merit increase to get to this $6.15 an hour, that was the standard rate?

A. That was the rate, sir.

Q. Prior to the tachograph being put in your bus, just prior to the end of your employment, how many hours [33] a day were you being paid for?

A. Five and a half!

Q. You are positive of that?

A. Yes, I am.

Q. It couldn't have been six and a half, could it?

A. No, sir.

Q. You couldn't be mistaken on that?

A. No, sir.

Oh, wait a minute, what am I talking about? Yes, six and a half—I'm glad you brought that up—six and a half. You are correct.

Q. And you had been paid for six and a half hours a day for at least the last three months of your employment.

A. Yes, sir.

Q. With regard to your union activities, you weren't the first person to contact the union, were you?

A. No, I went to the firm with someone else prior to me.

Q. Were you told that someone else was?

A. Yes, I was.

Q. Who was that?

A. David Wands.

Q. Is he an employee—or was he an employee of Transportation Management at the time?

A. Yes, he was.

[34] Q. How many cards did you have signed by the end of the week of March 23?

A. Cards signed? I don't understand what you mean.

Q. Authorization cards?

A. Approximately seven.

Q. And these are the cards you picked up on Tuesday, is that correct?

A. Yes, sir.

Q. So by the end of the week Friday, March 23, you only had seven cards signed, is that right?

A. Yes, sir.

Q. You testified previously that you had a phone conversation on Friday, March 23 at about 6 o'clock with George Patterson, is that correct?

A. Yes, sir, I did.

Q. And that you had called George Patterson—you initiated the phone conversation?

A. Yes, sir, I did.

Q. That you initiated this because of something Ed West had told you?

A. Yes, sir.

Q. Is West related to you?

A. He is now, sir. I married his sister.

Q. So he is your brother-in-law?

A. Yes, sir.

[35] Q. And you live in the same house?

A. Yes, sir. He resides with us.

Q. Are you sure that call took place at six o'clock in the evening?

A. Pretty sure. I had thoughts the call might have been made Saturday morning too, but I'm pretty sure. Yeah, I'm going to hold with Friday. I know I made the call.

Q. friday at six?

A. Yes.

Q. Isn't it a fact that Ed West was at the garage at about six o'clock on Friday to go to New London?

A. I am not sure where he was. The call was made after I was home, though. my call to Mr. Patterson was made—

Q. After Ed West had gotten home?

A. Yes, sir. And he related to me what Mr. Patterson said to him.

Q. And in this conversation you say something was said about Patterson said, "I am going to have to pretend that I'm mad at you."

A. Yes, sir.

Q. In fact, didn't that conversation take place about 11 o'clock in the morning?

A. Saturday morning?

Q. Friday morning?

[36] A. That's possible too. It was after I got home—

Q. The question simply is, isn't it possible?

A. Yes, it is.

Q. As a matter of fact you are not even sure why that call took place, are you?

A. Yes, I am. I am definitely sure why it took place.

Q. In your statement that you gave to the National Labor Relatons Board do you recall this statement, "Also on the 23rd for some reason that I don't recall, I was talking to Patterson on the phone at about 11 a.m. in between runs. During this conversation all that I remember is that Patterson told me 'when you come in on Monday I am going to have to pretend I am mad at you' and he made some reference to the call never taking place."

A. Okay, yeah, I made that statement.

Q. You made that statement?

A. Yes, sir.

Q. There is no other question before you.

A. All right.

Q. So you did make the statement that you don't recall why the phone call took place?

A. Yes.

Q. Where did you make that call from?

A. My home.

Q. From your home?

[37] A. Yes, sir.

Q. And you think it was at 11 a.m. or do you think it was at 6 p.m.?

A. It's possible, sir.

Q. It's possible 11 a.m.?

A. I'm not sure of the time. It's possible it was made then.

Q. And he said, "I am going to have to pretend I am mad at you"?

A. Exact words. And he used Monday too, "when you come in Monday."

Q. In that phone conversation that took place on March 23, whether it was 11 a.m. or 6 p.m., did you testify that the purpose of that call was to tell George Patterson not to take it personally?

A. Yes, sir.

Q. Did you ever have any other conversation with Patterson where you told him not to take it personally?

A. No, sir.

Q. Do you recall in your affidavit that you gave to the NLRB stating, "A few days after my discharge on March 26 West also told me that Patterson had said to him, 'I am taking this personally. I have done so much for Sam, I don't know why he is doing this to me.' I called George when I found this out and told him not to [38] take this personally."

Do you recall making that statement?

A. I made that statement, but did you say after I got discharged?

Q. I have read the statement.

A. Could you read that again, sir? I want to hear that again.

Q. Sure. "A few days after my discharge on March 26 West also told me that Patterson had said to him, 'I am taking this personally. I have done so much for Sam, I don't know why he is doing this to me.' I called George when I found this out and told him not to take this personally."

Do you recall making that statement?

A. Hold it.

Q. Do you recall making that statement?

A. No, I don't recall making that statement before my discharge, no, sir, I don't. I don't recall that at all, not before my discharge—I mean after my discharge.

Q. Was this the statement that you gave to the NLRB?

A. Which one are you talking about, sir.

Q. I am just asking you if that is the statement that you gave to the NLRB?

A. Where is the statement we are talking about?

[39] Q. I am asking you if this whole affidavit is?

A. Yes, sir.

Q. Is this your signature on that page?

A. Yes, sir, that's my affidavit.

Q. And these are your initials at the bottom of this page?

A. Yes, sir.

Q. Would you read starting here—

JUDGE FISH: What page are you referring to?

MR. WELENSKY: The bottom of 4 and the top of 5.

JUDGE FISH: Show it to him and let him read it.

Q. Would you read it aloud, please?

A. "A few days after my discharge on March 26 Ed West also told me that Patterson had said to him, 'I am taking this personally. I have done so much for Sam, I don't know why he is doing this to me.' I called George. . .—

Q. You'll have to speak up.

A. Do you want the rest of this?

Q. Right down to the bracket.

A. I called George when I found this out and told him not to take this personally.

Q. And that isyour initials on that page?
A. Yes, sir, it is.
Q. Do you recall making that statement?
[40] A. Yes, sir.
Q. Now you referred before to a situation where the monitor had obtained a cup of coffee for you which you took on the bus with you?
A. Yes, sir.
Q. Do you recall when that took place, that situation?
A. Exact date no, I don't. I think it was late September of '78 or '79—October of '78.
Q. Did George Patterson speak to you about that?
A. Yes, sir, he did.
Q. Did he tell you how he knew about it?
A. No, he didn't. I never found out his source. I never asked him.
Q. Did he mention to you that he heard it from some official of the Springfield school department?
A. I think he did.
Q. Did he refer to a John Malone?
A. He might have. That name comes up so often because he is head monitor.
Q. Is it possible he had heard from John Maloney about this?
A. It's quite possible, yes.
Q. Did you make a statement in this affidavit that aside from this situation, did you state, "Otherwise I never take coffee breaks"?
[41] A. Yes, I did, I made that statement.
Q. And when he had this conversation with you, George Patterson had this conversation with you about this particular incident, didn't he also mention to you that he talked to you previously about taking coffee breaks?
A. No, sir.
Q. Didn't you say in your statement that you gave to the NLRB, "He went on and said, 'I have talked to you about taking coffee breaks before"?
A. He might have made that statement, sure.
Q. He did make that statement?
A. I forget.
Q. Did he say he made that statement?
A. He did, all right.
Q. Back then you had a working tachograph on your bus, is that correct?

A. Back then when?

A. In September of and October of '78?

A. I'm not sure. I just drive the bus.

Q. Didn't you also state in this affidavit that in that same conversation you stated, "He then began to trace my steps on the tachometer and I replied, 'that's when I am waiting for kids or when they are coming out of school"?

[42] A. Yes, sir, I made that statement.

Q. So you did have a tachograph at that time, or a tachometer?

A. Are you talking about the time—no, sir.

Q. You didn't?

A. No.

It doesn't refer to that. That refers to my tachograph that he pulled from the bus when he fired me. That's what that refers to.

Q. When he said to you, "I have talked to you about taking coffee breaks before," did you respond, "Well, George, I may have stopped at a restaurant or something to use the bathroom but that is the extent of it?"

A. Yes, sir I made that statement.

Q. In fact, weren't you denying that you ever stopped for coffee breaks?

A. At that time yes, I was.

Q. And, in fact, you had been taking coffee breaks?

A. Yes, sir, I was.

Q. So when you made that statement that you were only stopping at a rest room to use the bathroom but that is the extent of it, in fact, you weren't telling the truth at that time, were you?

A. At that point no, sir, I wasn't.

Q. When you got called in on March 26 by George Patterson [43] because he said he wanted to talk to you, you testified that you were concerned you might be fired, is that correct?

A. Yes, sir.

Q. And you contacted union representative because of this fear?

A. I went to see him, that's right.

Q. In fact, did n't you say to George Patterson that the real reason you were being fired was because of union activities?

A. No, sir, I never made that statement.

Q. But you believed that, is that correct?

A. Yes, sir, I believed it.
Q. You never said it, is that what you are saying?
A. To the best of my recollection, no, sir.
Q. Is it possible you might have said it?
A. Okay, it's possible.
Q. Didn't you ask Mr. Patterson to give you the reason for being fired in writing?
A. Yes, sir, I did.
Q. And what did Mr. Patterson do?
A. He said he didn't have to put nothing in writing and that ended that conversation.
[44] Q. When you stopped for these coffee breaks in that morning and the afternoon, how long were those breaks for?
A. A good 10 minutes.
Q. I'm sorry?
A. Ten minutes.
Q. Did you say a good ten minutes?
A. Definitely 10 minutes, no doubt in my mind.
Q. Did it go on longer?
A. No.
Q. You didn't exceed 10 minutes, is that what you are saying?
A. No, it didn't exceed 10 minutes. By then I am on the bus and ready for school.
Q. Now this stopping at your house in the afternoon, is that when you stopped at your home, in the afternoon?
A. More or less the evening.
Q. Well, it was before six o'clock?
A. Yes, sir.
Q. Before bringing the bus back to the garage?
[45] A. Yes.
Q. Had you completed your run at that time?
A. Yes, sir.
Q. By the way, are there rest rooms back at the garage?
A. Yes, there are, sir.
Q. How long is it from your house to the garage?
A. Fifteen or twenty minutes. It all depends on the traffic.
Q. You were stopping at your house before going back to the garage, is that correct?
A. Yes, sir.
Q. How often were you doing that?

A. A good three times a week at least.
Q. At least three times a week?
A. Yes.
Q. Could it have been four or five times a week?
A. Yes, sir, it could have.
Q. And how long were those stops for?
A. Ten or fifteen minutes.
Q. So those stops exceeded 10 minutes?
A. It's possible, yes, on some occasions they did.
Q. Could they have been as long as 20 minutes?
A. I don't think so.
Q. Possibly?
A. Possibly.

[46] Q. In your statement didn't you mention that you only stopped at your house about twice a week?

A. Yes, I did.

Q. Did you also make the statement in your affidavit that the longest the bus has ever been at your house was for 10 minutes?

A. Yes, sir, I made that statement.

Q. And that was a sworn statement you gave wasn't it?

A. Yes, sir.

Q. Now you are saying that your stops were 15, possibly even 20 minutes, is that correct? Isn't that what you are saying now?

A. I still want to stick to 10 minutes, but you are using the word "possible." Anything is possible. I mean, it's possible it's 15 minutes.

A. Maybe I am confused. let's see if I am confused on this. I thought you testified that your break in the afternoon at your house were for 10 minutes to 15 minutes and I asked you if it was possible even longer, could they possibly have been 20 minues.

A. And I just said that was possible.
Q. It's possible they were 20 minutes?
A. It's possible.

[47] Q. (by Mr. Welensky) On the way from the last drop off of the day, is it an absolute direct line back to the garage by your house?

A. Yes, sir.

Q. You don't have to make any turns or go off—

A. There's one quick turn and that's it, right on my street.

Q. Do you know how much time once the tachograph was installed in the last two or three weeks before your discharge, do you know how long the tachograph shows you were actually working? Do you know how many hours it shows?

A. I am not sure.

[49] Q. Did Mr. Patterson ever speak with you about taking the bus to your home, taking that break at home?

A. No.

Q. Never spoke to you about that?

A. No, sir.

Q. Did Mr. Patterson ever tell you that he received information from people that live on Alcon Drive that you had been bringing the bus home?

A. No, sir, he never mentioned it to me.

[50] Q. to your knowledge were you paid for the time when you were at home in the afternoon on that break?

A. I have to explain that, okay?

Q. Well, let me ask you this. Prior to the tachograph being put in just prior to your discharge, were you paid for that time?

A. Yes, sir. But it wasn't for that time—I have to explain it.

THE WITNESS: Again, that tachograph, sir, shows when that bus is moving and when it is not moving. There is time that I put in in the garage—a lot of [51] other drivers put in too, but I personally put in that I was not getting paid for.

MR. WELENSKY: I'll move to strike the answer. The answer is not responsive to the question. The question was, are you paid for the time. His answer should be yes or no. The answer he gave a yes answer, the explanation—

JUDGE FISH: He gave an explanation and I will allow it to remain.

Continue.

MR. WELENSKY: I take it my motion to strike is denied?

JUDGE FISH: Yes.

Q. (by Mr. Welensky) You did hear from a neighbor, didn't you, a neighbor on Alcon Drive that George Patterson was making an inquiry into finding out if you were stopping at your house?

A. No, sir.

Q. You didn't hear that from a neighbor?

A. No, sir.
Q. You didn't hear it from a Nancy Danco?
A. No, sir.
Hold it—repeat your question. I want to hear that one again.
Q. Did you hear from a neighbor of yours on Alcon [52] Drive, Nancy Danko, to be specific, who also was a coworker, that George Patterson was making inquiry to see if you were—
A. Yes, after my discharge.
Q. But you had heard that?
A. Yes, sir, after my discharge.
Q. Did you believe you were authorized to take the bus home?
A. No, I didn't. It was en route.
JUDGE FISH: I didn't hear you.
THE WITNESS: It was en route. If I was authorized to take the bus home?
Q. Yes.
A. I didn't believe that, no.
Q. Were you ever warned about leaving keys in the bus?
A. Never, that is something I never did, sir.
Q. I am talking about when the bus was brought back to the garage?
A. Never.
Q. You were never spoken to about it by George Patterson?
A. No, sir.
Q. You were never spoken to about it by Ron Sullivan?
A. No.
Q. Were you ever told not to leave the keys in the bus?
A. No, sir.
[53] Q. Were you ever told to hang the keys up on a key rack in the office?
A. I knew the keys were on the rack but I was never told to do it. I was never told it was mandatory, that that was the procedure, no, sir.
Q. You know there is a key rack in the office?
A. Yes, sir.
Q. You know that is a key rack for the bus keys, isn't it?
A. Yes, sir.
Q. You left the keys in the bus?

A. Yes, sir.
Q. And at t-he end of the day—
A. My keys go on the rack.
Q. You always leave your keys on the rack at the end of the day?
A. Yes.
Q. When you say you were never told to hang up the keys were you referring to any time.
A. Any time.
Q. At the middle of the day or the end of the day?
[54] A. I never was told by anyone to hang those keys on that rack, but that was a mandatory procedure.
Q. At the middle of the day or the end of the day, is that correct?
A. Yes.
[55] A.Q. On Saturday, March 24, you stated that you called drivers and told them there was a union meeting. Where were those calls made from?
A. My home, sir.
Q. Do you know who else was home at the time?
A. My wife, maybe a couple of my kids.
Q. No one from the company there?
A. No, not that I know of.

REDIRECT EXAMINATION

Q. (by Mr. Kennedy) Mr. Santillo, those coffee breaks you took, one in the morning and one in the afternoon at local restaurants, when you took them would you have occasion to use the bathroom facilities at the restaurant as well?
[56] A. The first restaurant was locked, employees only. The second one no bathroom.
Q. So in the afternoon then—
A. I had to go bad.

RECROSS-EXAMINATION

Q. (by Mr. Welensky) Have you ever discussed, did you ever have a conversation with George Patterson about the tachograph reading, how they read, how they paid?
A. On a previous shifts on a couple of occasions.
Q. You had a tachograph on your bus at that time?
A. On the mini-bus yes, the year before.
Q. Would you relate what those conversations were?

A. Yes. He went through his little procedure—I don't know what you call it, it's a dial thing. Again, it shows you when that bus is moving, and that's the time that the company pays you for, when that bus was on the move. no time for school, picking up kids, in between, he deducted it all. And I used to fight for it.

I used to come down and tell him, "Look, George, it's company time that I am putting in. I want to get paid for it." He never gave me a hard time about it.

JUDGE FISH: Did he pay for the time?

THE WITNESS: Yes, sir.

He ended up paying you for that time?

[59] JUDGE FISH: Just answer the question.

THE WITNESS: I never did.

Q. But the five or ten minutes you complained about you were getting paid for?

A. On the mini bus.

Because he was deducting that time on a couple of occasions.

Q. Did you think that the company ws being overly-petty by deducting that?

A. My personal opinion yes, I thought they were being petty because it was company time. It was their gas I had to get in there and their circle checks, and those children had to be coming out of school. Yes, I think it was petty.

Q. And that is why you made a complaint about it?

A. Yes.

Q. Because you felt that actually you were on the company's time, you were working?

A. Yes, sir.

Q. When you were waiting for the children you were working, is that the reason for your complaining about it?

A. Yes.

Q. But other than that you were being paid by the tachograph, according to what the tachograph showed?

A. No, there was occasions—George has put in so many hours. I'm not sure, I don't make up the payroll but [60] my checks always read the same hours. He would pay me so many hours. How he arranged it I don't know.

Q. Just coming back briefly, when you got to school and you were waiting for the kids for five or ten minutes before the bus started rolling again, you complained it was working time and you wanted to be paid for it?

A. Yes, sir.

Q. Did you also feel that way about the coffee breaks in the morning and in the afternoon?

A. No. I thought I wasn't getting paid for any of it.

Q. How about stopping at your home?

A. Same thing. I didn't think I should get paid for that and I didn't.

[62] JUDGE FISH: I just want to understand your testimony.

JUDGE FISH: Forget about gassing up. I am talking about coffee breaks and I am talking about the times that you stopped at your home to go to the bathroom. You say you did this pretty much on a daily basis?

THE WITNESS: Yes, sir.

JUDGE FISH: For that period of time, I am trying to understand your testimony, did you or did you not get [63] paid for those minutes, as far as you know?

THE WITNESS: According to the company, yes.

But there was time in the morning I wasn't getting paid for, that I had to do, I had to gas up. That's five or six minutes alone.

Secondly, I want to go over a little bit the conversation that you had with Mr. Patterson when you called him up on the 23rd, I believe, at 6 o'clock or 11 o'clock—I am not concerned with the time.

Try to tell me as best you recall how this conversation started? You called up, and you had just been told by Mr. West that what?

THE WITNESS: That he was taking—

JUDGE FISH: This was something that allegedly Mr. [64] Patterson had told Mr. West and he reported it to you?

THE WITNESS: Yes.

JUDGE FISH: So he made the statement to you and you called up Mr. Patterson—try to remember, how did you start the conversation? What did you say?

THE WITNESS: I said, "George, I would like to talk to you about—Eddie just got home and he told me you are taking this personally."

JUDGE FISH: And what did he say to that?

THE WITNESS: That is what I was trying to get across. At that point in time he said, "Call me back in five minutes. Somebody just walked in the office. I can't talk," boom.

I did, I called back in five minutes. And again I said, "George, I was told you are taking this personally and I want to tell you I still feel you are my friend and I don't

want you to take this personally. It really is between the Teamster's Union and the TMC." I said, "I can understand your position, being manager, but you and I are out of the picture."

I said, "Please don't take it personally. I like you [65] as a friend." That is what I told him.

JUDGE FISH: What did he say?

THE WITNESS: He was very nice. He said, "I understand," he said, "Just make sure that everyone you talk to understands what the Union is all about and the rates and everything."

I said, "George, I will."

He said, "Okay, Sam," he says, "by the say, I've got to pretend I'm mad at you Monday morning."

JUDGE FISH: Did he pretend on Monday morning that he was mad?

THE WITNESS: I got in in the morning, we didn't see much of each other. I got my keys, I did my route, in other words.

JUDGE FISH: Monday morning he did not pretend he was mad at you, that you can recall?

THE WITNESS: I didn't have any words with him.

JUDGE FISH: In addition, you talked about your discharge interview or discussion, and Mr. Patterson said—"by the way this has nothing to do with the Union?" I am trying to understand how that particular remark came up into the conversation.

THE WITNESS: I don't know. He just brought it up out of the clear blue sky.

JUDGE FISH: Your testimony is just out of the clear [66] blue?

THE WITNESS: We were talking about getting keys to the bus and coffee breaks and, boom, he laid it on me. Nothing to do with the union—then he proceeded back to business. But that statement was just dropped on me.

JUDGE FISH: It wasn't precipitated by your stating that you believed that it had something to do with the union?

THE WITNESS: I didn't say nothing to relate to that, sir.

JUDGE FISH: He just said that?

THE WITNESS: Yes, sir.

JUDGE FISH: What did you say after he mentioned "by the way, this has nothing to do with the union"? Did you respond to that?

THE WITNESS: NO, I made no statement at all about that. I just was concerned about getting fired, no statement about unions.

JUDGE FISH: I have nothing further.

(Witness excused.)

[67] NANCY DANKO

was called as a witness by and on behalf of Counsel for the General Counsel and, having been first duly sworn was examined and testified as follows:

Q. While you worked for Transportation Management did you have occasion to take coffee breaks?

A. Yes.

Q. How frequently?

A. About every other morning. My monitor and I used to stop and have coffee.

Q. Would you stop at a local restaurant?

A. Friendly's on Berkwood Boulevard and Bay Street.

Q. And you had the bus with you at the time?

A. Yes, we drive a mini bus.

[68] Q. And after you were through with the bus—well, let me ask that question. Were you ever spoken to by management about taking coffee breaks?

A. No, sir.

Q. Did you ever bring coffee back from the restaurant to anybody at the terminal?

A. Occasionally I would do it on my own. I used to bring George coffee, because George and I got along great.

Q. You brought coffee back to the terminal—

A. Yes, for George, when I wanted to bring him coffee.

Q. In other words, on your own, when you finished dropping the children off, you had a cup of coffee and brought some back for George?

A. Yes. Not all the time, occasionally.

Q. And on those occasions did Mr. Patterson ever tell you you not to stop for coffee?

A. No, sir.

Q. Have you ever left your bus at the terminal with the keys in it, in the ignition?

A. Yes, sir. Well, when I'd go in to bring my bus in like with something to be done, whoever is there, the mechanic,

I used to leave the keys in the bus and go in the office. And when Mr. Zimmerman came I had to drive my bus down there because I keep my bus at home, and I [69] took it down there to bring for the weekend. I left my keys in the bus, because they were calling in your buses.

Q. Were you ever told that coffee breaks were prohibited?

A. No.

Q. Were you ever told there was a company policy about leaving keys in the ignition?

A. No, sir.

CROSS-EXAMINATION

[70] Q. When you stopped for these breaks, how long were the breaks?

A. It would be from 20 minutes to a half or hour [71] occasionally, not all the time. It would vary.

Q. Do you have any knowledge of whether or not you were paid for that time?

A. Yes, sir. My time was from 7:20 to 9:20.

Q. 7:20 to 9:20?

A. There was a two hour morning and two hours in the afternoon, and I would get done sometimes early.

Q. And you were getting paid for the two hours anyway?

A. Yes, sir.

Q. Isn't there a company policy that you are guaranteed two hours every morning?

A. I guess there is, but we were supposed to put our time down anyway.

Q. But you were aware a company policy that you get a guarantee of two hours every morning and two every afternoon?

A. Yes.

Q. And after Mr. Santillo was fired, did you speak with George Patterson about Sam parking his bus down there?

A. No, I did not—about Sam parking his bus down there?

Q. Yes.

A. No, sir.

I called Mr. Patterson and I was asking him a favor.

Q. And in that conversation was there some discussion [72] about Mr. Santillo parking his bus on Alcon Drive?

A. I called Mr. Patterson to ask him if I could use one of the company vehicles.

Q. In that conversation—

A. Yes, he asked me if I had seen Mr. Santillo's bus out there and I said no, not that I know of. I mean, I know I didn't see it because I babysit and that's around suppertime, and I don't see the Santillo's until late, like after supper.

Q. You are not looking outside at that time?

A. No, sir, I couldn't even see the street anyway from where I'm at.

Q. Did he say why he was asking that question?

A. No, he just asked me.

Q. Did he make the statement he had received some complaints about it?

A. Yes.

Q. He did say that?

A. Yes, sir.

[73] Q. Do you know of any drivers that stopped at their home during their route?

A. During their route?

Q. Yes.

A. No, I don't know of anybody that stops their bus.

Q. You don't know of anybody?

A. No.

REDIRECT EXAMINATION

[74] JUDGE FISH: Were you aware of any kind of a company rule with respect to coffee breaks?

THE WITNESS: No, sir.

JUDGE FISH: When you were hired was anything said to you at all about when coffee breaks were permitted or not permitted, nothing was mentioned?

THE WITNESS: No, sir.

JUDGE FISH: You decided to take it during this period of time, you just did it on your own? Did you discuss it with other employees to see if they did it?

THE WITNESS: No, I've seen other employees doing it, so that is when I just took it for granted that I can do it too.

JUDGE FISH: You have seen other employees take breaks?

THE WITNESS: Yes, sir, I have talked to a couple. [75] In fact, I met one at a Friendly's on State Street.

JUDGE FISH: So during these times you have taken coffee breaks there have been other employees of the company there at the time?

THE WITNESS: Yes, there's a lot of them. You see a lot of them.

[74] GEORGE PATTERSON

was called as a witness by and on behalf of Counsel for the General Counsel and, having been first duly sworn was examined and testified as follows:

Q. (by Mr. Kennedy) Mr. Patterson, what is the title of your position with the company?

A. I have not been assigned an official title on a business card. I am generally considered the manager.

[80] Q. Well, let's talk about the reasons for his discharge. Are you the individual who actually made the decision to discharge Mr. Santillo?

A. Yes, sir.

Q. And you made this decision on your own without any consultation from anyone else?

A. Yes, sir, based upon my reading of the tachograph and phone calls that I had had previous to that.

Q. The phone call previous to that was involving what?

A. Phone calls previous to that were, one, a phone call from Mr. Maloney of the school department about Mr. Santillo stopping with kids on his bus to buy coffee. Two would be phone calls saying that his bus was parked in front of his house every afternoon for about a half an hour.

Q. In Maloney's case how many times did he make these phone calls to you?

A. How many times?

Q. Yes.

A. He made the phone call once about the coffee break.

[81] Q. And that was riding in the bus with the coffee in his hand?

A. No, sir. The complaint was brought to him by a parent. The youngster came home and told him that the bus driver had stopped at the State Diner on State Street for coffee. The monitor had gotten off and gotten the coffee, and drove with the coffee in one hand.

Q. And you told Mr. Santillo about this?

A. Yes.

Q. And he understood after that that he was not to drive a bus with coffee?

A. I believe he did, sir.

JUDGE FISH: Excuse me. When was this conversation?

THE WITNESS: For the record I'm not exactly sure. It was some time—Mr. Santillo said it was late October.

JUDGE FISH: What do you say, to the best of your recollection?

THE WITNESS: I believe it was the latter part of 1978, November or December.

Q. (by Mr. Kennedy) Now the phone calls to Maloney involved two, who were they?

A. One was an anonymous call who said that they were aggravated that the bus was parked blocking the entrance to Alcon Drive every afternoon and it was there for a half [82] an hour.

Q. And that anonymous call was when?

A. That was towards the latter part of February, sir.

You received another phone call. Who was that from?

A. I am not sure whether I received the phone call or if it was in a phone conversation with Sheila Kelly. I asked her if she, in fact, had seen Santillo's bus parked there and she said yes, it was there every afternoon.

And another conversation with another driver, Diane Saderopolis, I confirmed this fact that, yes, in [83] fact, the bus was parked there in the afternoon.

Q. And these were in late February, these conversations?

A. Yes, sir, between about—the drivers more accurately gave it to me at about between 5 and 5:20, or thereabouts, you know, varying from day to day, about 5 or 10 minutes.

Q. In either case did you bring to the attention of Mr. Santillo the anonymous phone call or the conversations with Saderopolis and Kelly?

A. Yes, sir, I did.

Q. When was that?

A. That was in late February. I do not recall the exact date but, again, I was quoted, "You know that when I am on that bus it is always rolling. I am not stopping.

Q. So after the conversations with the anonymous phone call and Saderopolis and Kelly you had another conversation?

A. With Santillo, yes, sir.

Q. And he assured you he was not doing that?
A. Yes, sir.
Q. Subsequent to that time did you determine that he was still doing it?
A. Subsequent meaning after that time?
Q. Yes.
A. I had ordered Mr. vanHorn to put a tachograph in his bus.
Q. Aside from the tachograph, did you have any other [84] evidence he was stopping at his house on Alcon Drive?
A. No, sir.
Q. So he assured you on two occasions that he was not doing so?
A. Yes, sir.
Q. And yet on March 26, seven days after Mr. Santillo started the union activities, you discharged him for, among others, that offense?
A. I believe Sam stated that he started his union activities on the 19th.
Q. All right.
A. Yes, I did.
Q. When did you first become aware of Mr. Santillo's union activities?
A. On or about Friday, the 23rd.
Q. How did that come to your attention?
A. Through conversations with drivers.
Q. How did these arise, these conversations? Did you go to the driver and ask him who was active for the union?
A. No, sir.
Q. They volunteered this to you?
A. Some drivers did, other drivers I did question.
Q. You what?
A. I did question about union activities.
[85] Q. The drivers you questioned, how did you go about this?
A. The one driver that comes to mind in particular. I asked him if he knew anything about the union and he said yes, he had in fact signed a card and was for the union.
Q. And what driver was this?
A. David Stebbins.
Q. What else did you say?
A. I asked him why he was for the union and he replied that it takes a giant to fight a giant. And I said, "Well, I guess I can see that point, but have you ever had any prob-

lems with this organization as far as any grievances go?" And he said, "No."

Q. You say by Friday you knew about the union activity of Santillo. Did Stebbins tell you Santillo was there?

A. No, sir, I knew about union activity that Friday.

Q. Who else did you question about the union?

A. Direct interrogation?

Q. No, just questioned in the most casual senses up to the most formal?

A. Probably several others. I have so many conversations in the course of a day that it's difficult to relate these small ones.

Q. But on these five or six occasions you approached [86] five or six different employees and asked them about the union?

A. No, sir, I don't believe I asked that many. David Stebbins is the only one that I recall directly questioning about his union activities.

Q. All the others came to you voluntarily and told you?

A. Yes, sir.

Q. Did they tell you who was the ringleader?

A. No, sir.

Q. Did you ask who the ringleader was?

A. No, sir.

Q. Was this of no concern to you?

A. It was of concern to me, but by that time I had been made aware of the procedures involving company union activity.

Q. So none of them offered it to you and you never asked?

A. Someone volunteered that David Wands had been in touch with the union. These were the drivers from the Ross School that he had approached.

Q. Did you ever go to anybody's home and ask them about the union, or anywhere away from your work set?

A. Not to the best of my knowledge. I spend probably 12 to 14 hours a day in that place. I generally like to have my own time.

[87] Q. When did you become aware that it was unlawful to question employees directly about the union?

A. I believe it was sometime over the weekend between Friday night, I believe it was Friday night—Friday night or Saturday morning.

Q. So you talked to Mr. Stebbins before that? You talked to him when?

A. I talked to him about six p.m. on Friday evening. He and Mr. West were waiting to pick up their Perkins resident runs, which left the garage at around 6:30–

Q. When did you become aware of specifically Mr. Santillo's activity in the union?

A. From his phone call.

Q. When was his phone call?

A. I believe his phone call was on Saturday morning. That was the phone call which he was not sure of the time of. It was either 11 on Friday morning or on Saturday.

Q. What was said during this phone call?

A. He called me up and he says, "George, I hope you are not taking it personally."

And I said I was a little upset, but that was the extent of it.

Q. When he said "taking it personally" what did he mean?

A. I don't know. At that time I had checked his tach and [88] found him to be stealing time.

Okay, whether he was referring to his union activities or the fact that he was stealing time I do not know.

Q. What did you say in response, now, to when he said, "I hope you are not taking it personally". What did you say?

A. After that I said I didn't want to discuss anything with him because of the rules I had been warned.

Q. But you didn't ask for an explanation when he said, "I don't want you to take it personally"

A. No, sir.

Q. And you didn't know what he meant by it either?

A. No, sir. He was either referring to his stealing time or his union activities.

Q. But you didn't know he was active in the union at that time?

A. Yes, sir, I believe I did.

Q. I thought you said the first time you learned about his union activity was in the phone call he made to you on Saturday morning?

A. You are questioning me about that phone call?

Q. That's right. And in that phone call—correct me if I'm wrong—he said, "I hope you don't take it personally." did he preface that remark by anything about unions?

[89] A. Not to the best of my knowledge.

Q. You got a phone call at work on a Saturday morning from an employee who opens the phone call saying, "George, I hope you are not taking it personally." And you respond what?

A. He had told me about his conversation with Eddie West. He said Eddie West came home, he told me what was going on, he said you were taking it personally.

Q. Now try to relate the specifics of the conversation as best you recall. He called you and you said hello, he said hello and then what was said?

A. He said, "Look George,"—he gets a little excited and he came off from the shoulder—"Eddie just came home and told me about this and that"—

Q. Did he say this and that?

A. No, he didn't.

Q. What did he say?

A. I believe it was about his union activities.

Q. He said, "Eddie just came home" and told him what?

A. Non specifics about the union business. I did not believe at the time he mentioned he was a ringleader or anything like that.

Q. You see, I am trying to reconstruct this phone conversation because it may very well be that there is no dispute between you and Sam as to what was said here. [90] What is puzzling me—say it again—he started the conversation by saying what?

A. He opened up the conversation and he mentioned—

Q. Mentioned what? How did he say it? What words did he use?

A. I don't recall the exact wording at this time. He started the conversation with the fact that he had just talked to Eddie West and Eddie had related to him, that I was pretty upset about what was going on in the office Friday night.

Friday night was the night that we had the tachographs out. I realized there was a gap in the graph.

Q. You were upset about that?

A. I was upset about it.

Q. How much of a gap was there?

A. A considerable gap. I would say 15 minutes in the morning and 15 minutes in the afternoon.

Q. You don't have occasion to go over all the tachs, do you?

A. Yes.

Q. You review the tachs in any event?

A. Yes, I review all the tachs.

Q. Was his a departure significantly from others?

A. Yes. Two weeks previous I had asked—I believe it was three weeks previous, I had asked Mr. vanHorn to [91] install a tachograph in Sam's bus to investigate these complaints brought on by the phone calls.

Q. How long before was that now?

A. I believe it was three weeks before. Mr. vanHorn did not get to them that Monday morning.

Q. But I thought you had cleared up the matter of the phone calls—the issue was going to his house, if you recall, and stopping off at his house? That is what the phone calls involved?

A. Yes, sir.

Q. You didn't get any phone calls about him going in for coffee in the restaurant in the morning and in the afternoon, did you?

A. No.

Q. You were checking out whether he was at his house or not?

A. Yes, sir.

Q. And you have an automobile and it didn't dawn on you to go out there at the time that he apparently was there—it's only 15 minutes away—and check to see if he was there?

A. I also have a phone attached to my ear for approximately 10 hours a day, and 70-odd drivers.

Q. Do you have an assistant?

A. Excuse me?

[92] Q. Do you have an assistant?

A. Yes and no. I do have an assistant—

Q. You have Mr. vanHorn?

A. I have Mr. vanHorn.

Q. Another management official. Could he have gone out to see if this was true?

A. Yes, sir.

Q. The tach really wouldn't tell you what the man was doing, would it?

A. When you compared it with his route sheets, yes, you can determine from a tachograph, when you know the route followed you can determine what is taking place.

Q. You could tell on a 10 minute gap or a 15 minute gap that he would be at his home in Chicopee or having coffee, as opposed to having the engine shut off and waiting between stops?

A. Yes, sir.

Q. You could?

A. Yes, sir.

Q. How would you do that?

A. The time at which the engine in stopped.

Q. The time at which the engine is stopped?

A. Yes, sir.

Q. It would be between pick ups and deliveries, would it not?

A. The question with the stopping at home, his four [93] o'clock pick up was at Sunshine Village in Chicopee. The stops in question occurred between five o'clock and five-twenty. He generally returned to the garage at five-thirty.

Q. The question would be then, how often have you done this for employees? How often have you made checks of tachs and disciplined employees like this?

A. On a continuing basis?

Q. Yes.

A. It is done weekly when I pick up a conflict with their run. That is not to say I catch someone every week.

Q. When was the last time you fired someone?

A. For what?

Q. For doing this?

A. For doing what?

Q. Stopping off at their house presumably on the way back to the barn?

A. I have never caught anybody doing that, with the exception of Mr. Santillo.

Q. He is the first person to be discharged in the history of the terminal in Springfield for that offense?

A. For cheating on his time, yes, sir.

Q. And the day you actually called in the tachs and read them was what day?

[94] A. The tachs were read—what do you mean by read?

Q. The time you got angry with him, you said you were angry, or Mr. West started a conversation with you, Mr. West said you were upset?

A. The tach was pulled on Friday evening and at that time we determined that the stop in question was being made.

Q. So that is the time that you pulled the tach?

A. Yes.

Q. And that is the first time you pulled and reviewed the tach?

A. No, sir, I pulled the tach the previous Friday and reviewed it.

[95] Q. But not one single day during that previous week did any of the tachs indicate that Mr. Santillo was, in fact, stopping at that hour?

A. Yes, I believe they did.

Q. Why didn't you bring it to his attention then?

A. I was looking to fire him and looking for evidence to fire him from.

Q. You had determined to fire him?

A. No, I had determined to confront him with both his denial of the stops and the tachograph readings.

Q. And although you had evidence that he was doing this before March 19 when his union activity began, you chose the Monday, March 26, after you had knowledge of his union activity, is that correct?

A. Yes.

Q. On the morning of the discharge you have heard [96]Mr. Santillo testify about a phone call you made that interrupted your conversation with him?

A. Yes, sir.

Q. Who was that phone call to?

A. Mr. Richard Zimmerman.

Q. And what did you say in that phone call to Mr. Zimmerman?

A. Mr. Santillo had asked for his discharge in writing and I asked him to wait outside while I called Mr. Zimmerman and asked him what I should do, give it to him in writing or what. I had never had an employee ask for a written discharge. When someone is discharged and they ask for a written reason to collect from unemployment and so forth, I generally tell them file and then they will send me the papers and from there it will go through the unemployment process.

Q. Did you discuss with Mr. Zimmerman the reason for the unemployment?

A. Yes.

Q. Did you discuss with Mr. Zimmerman the fact that Mr. Santillo was active in the union?

A. Yes, sir.

Q. What did Mr. Zimmerman say about that?

A. Regardless—may I say something?

Q. Just tell me what he said, what Mr. Zimmerman told [97] you and what you told Mr. Zimmerman?

A. Mr. Zimmerman said regardless of what it was, get rid of him.

Q. Now there is a monitor on that school bus that Mr. Santillo was on, isn't that correct?

A. Part of the time, yes.

Q. And that monitor is paid by the City of Springfield?

A. Yes, sir.

Q. Did you ever have occasion to ask that monitor what Mr. Santillo's practices and habits were?

A. No, sir, the monitor was not in attendance when Mr. Santillo was doing his Chicopee run.

[100] Q. How can you determine whether he was stopped at a light or stopped at a school?

A. Traffic lights are generally one minute.

Q. Traffic lights are generally one minute?

A. One minute, a school drop off should take no longer than three minutes.

Q. And you are able to determine from the tach that he was not at a light, not stopped and idling for any other reason and was, in fact, stopping at a school?

A. Which time are you referring to?

Q. Because traffic lights are always one minute?

A. No, sir, I said generally they are about one minute.

Q. If he were really in a line of cars approaching the traffic light in early morning hours, rush business hours with all the traffic in the area, could it be that he was stopped at that light for in excess of three minutes?

A. Yes, but it would also show him moving up in the line of traffic.

Q. You can also determine whether he is moving up in the line of traffic as well from the tach?

A. Yes.

[102] Q. Getting back to the monitor situation, you felt fairly certain that those 10 minute breaks, one in the morning and one in the afternoon, were coffee breaks and not stops for vehicle maintenance or checking or some problem

with the school children, somebody is sick on the bus or anything of that nature? It had to be coffee breaks?

A. Well I had at that time eight days, and at approximately the same time every day the same kid got sick, he got caught at the same traffic light—

Q. Or he was in between the same schools?

A. He definitely was in between the same schools.

Q. With his bus waiting for the next pick up?

A. I do not know what he was doing.

Q. Why didn't you ask the monitor? Isn't she appointed there by the school committee, your contractor, to determine [103] that question?

A. In a subsequent conversation with John Maloney of the school department—

Q. Subsequent to the discharge?

A. No previous, excuse me—subsequent to the earlier conflict with the stopping with the kids on the bus for coffee, that would have been October, November, February, whichever, I had had a conversation with Mr. Maloney about the monitor, Shirley Gordon. And there was some question in Mr. Maloney's mind whether the monitor was actually in attendance on these runs.

It had been reported by other monitors to the monitor department that Mr. Santillo's bus was running on several occasions with no monitor in attendance and school children on board.

And Mr. Maloney also raised with me the question of Mr. Santillo—let me explain something. The pay procedure for the monitors is set up so that the monitor does a morning run, the drivers signs the card after that run. The driver does the p.m. run and the driver signs after the p.m. run, and so on for the whole two week pay period.

Mr. Maloney brought to my attention that Shirley Gordon's card looked as if it had been signed all at one time, that Mr. Santillo just sat down and signed his name in 14 different places.

[104] Q. You are getting a bit far afield. I am interested to know how Mr. Maloney determined it was signed at one time.

A. If you sign something 14 different times on 14 different days obviously you are not going to have the same pen all 14 times—

Q. If you had a suspicion he signed at one time what did you do in response to that?

A. I asked Mr. Santillo.

Q. And what did he say to you?

A. He said yes, in fact he did sign it all at one time. And I told him to discontinue that practice.

Q. And did he?

A. I did not hear subsequent to that from Mr. Maloney.

Q. Keeping that in mind, the brief history situation, [105] I ask you again, why didn't you ask the monitor to verify whether Mr. Santillo was actually taking coffee breaks or stopped by the side of the road?

A. The whole reason for that last five minute dissertation was an oath that both Mr. Maloney and I had suspected collusion between Mr. Santillo and the monitor as far as her time and attendance records go. So if one person would lie in one instance, or if Mr. Santillo would verify her attendance in one instance why would not Gordon wash the other hand?

[106] Q. And you and Mr. Maloney allowed this fraud to continue all the way up to March 26, and given that fraud never brought it to Mr. Santillo's attention as a basis for his discharge?

A. No, I brought it to Mr. Santillo's attention. No one said—there were thoughts of fraud—I brought it to Mr. Santillo's attention that he should not sign the card on a weekly or bi-weekly basis.—

Q. And he said he wouldn't do it anymore?

A. When the monitor showed up for the run.

Q. And he said he wouldn't do it anymore?

A. He agreed he wouldn't do it anymore.

Q. And yet you didn't believe him?

A. Excuse me?

A. And yet you did not believe him?

A. I did believe him.

Q. So you did believe that since that time he corrected his conduct and was not doing it anymore?

A. Uh-huh.

Q. Therefore, whatever collusion transpired—your words—they ended back when you talked to him in November or December of 1978?

A. Yes.

[107] Q. Your solution to the problem of stopping at home was to install a tachograph?

A. My thoughts of him stopping in the morning for coffee had been dispelled by his saying, "Oh, I didn't know it

was wrong. I won't do it again," period. I took him at his word.

The same with the discussion about Shirley Gordon and the time cards.

[108] Q. Two techniques, one, going out to check the precise time it shows on the tach every day that he is at his home and, two, asking the monitor what he was doing during those two 10-minute breaks. You didn't use either system of verification?

A. No, sir.

May I clarify one point?

Q. You can clarify on redirect.

A. Okay.

[109] Q. From looking at these tachs, GC3(a), the face of this tach, can you tell me the maximum speed that vehicle was travelling at?

MR. WELENSKY: I am going to object to the entire line of questioning as to the speeds some buses may have gone.

MR. KENNEDY: What grounds? If I can show that other employees were engaged in conduct far more aggregious than the employee involved herein—

[110] MR. WELENSKY: I think it's—

MR. KENNEDY:—Santillo, and were maintained on the payroll, then it goes along with the showing that there was a particular reason for eliminating Santillo from the payroll, other than the offense which they claim to carry out.

JUDGE FINS: That is a different reason for discharge.

MR. KENNEDY: That is a different reason for discharge but what I contend is that employees were maintained on the payroll for offenses far more serious, after committing far more serious offenses—

JUDGE FISH: Such as what?

MR. KENNEDY: Such as going 60 miles an hour with a school bus full of children. That is as serious an offense as is involved here, and nothing is done.

MR. WELENSKY: That is your characterization.

MR. KENNEDY: I am going to ask the witness to characterize it in a moment. It's not mine. I will question the witness as to the gradation of offenses in this regard, and I want him to testify which is a greater offense, leaving the keys in the bus in the garage or travelling 60 miles an hour with a schoolbus full of children.

MR. WELENSKY: My objection is someone driving in excess of the speed limit canot be compared with the situation where someone is fired for being paid for time—

[111] JUDGE FISH: All right, I'll allow the questions.

Q. (by Mr. Kennedy) Can you tell us the maximum speed a vehicle travels—

JUDGE FISH: Do we have these documents identified?

MR. KENNEDY: Yes, that's 3(a) that I am showing him there.

MR. WELENSKY: Rather than voice my objections to each question, let my objection stand to the entire line of questioning?

[112] JUDGE FISH: Yes.

A. This particular run—

Q. No, I asked you the speed of that vehicle.

A. I thought you had asked me to read the tach.

Q. I want the top speed—

A. The top speed on this particular vehicle is 60 miles an hour. I know the run, the top speed is gained at 4 o'clock in the afternoon after the driver had cleared her Springfield run and was on her way down Interstate 291 to Sunshine Village.

The speed restriction of 45 miles an hour applies only when loaded.

[113] THE WITNESS: To his question going over 45 miles an hour, there are momentary peaks both morning and afternoon when the driver does go up to 45, sometimes 47 or so. But as you can see it's a time versus speed, so a sharp peak would be for a small length of time.

Q. Showing you General Counsel's 3(d), addressing your attention to the period of time that appears to be from 8:30 to 9:30, can you tell me the speed in that period of time?

A. We do have some speeds going up to as much as 50 [114] miles an hour.

Q. Rather constantly during that period of time?

A. Peaks, yes, sir.

Q. And school children are on the bus at that time?

A. Yes, sir.

Q. Were you aware of these?

A. Yes, sir.

Q. You knew about these speeds on Miss Strobells'—

A. Not those in particular. If you look more deeply into your batch of tachographs you'll probably find some of the

GMC buses with speeds of up to 80 miles an hour. These instruments are regulated from a drive gear from the transmission, like the speedometer on your car. You put on a different snow tire, you get a change in speed, a different drive gear for different rear end, and so on and so forth.

The speeds of the busettes in particular were never taken as a firing offense for anything because I realize that sometimes the speeds are wrong. On the other hand—

Q. In other words you are saying this tachometer is a somewhat unreliable instrument?

A. The tachometer itself is not unreliable. The matching of the snow tires and the gears of the transmission. When you change snow tires you should go through and change drive gears.

[108] Q. So you are saying although the instrument itself is properly functioning and the automobile is a properly functioning automobile, but the meshing of the two can, on occasion, rather constant occasion, result in inaccurate findings in the tachograph?

A. Will consistently, yes.

Q. So you never bothered to check—by the way you identified these as Miss Strobell's. I show you 3(b).

A. I believe Strobell was driving that bus at that time.

Q. You said if I went through all the rest of these I will find several more of these where the speeds are in excess of 40 miles an hour or in excess of 50 miles an hour?

A. Yes, sir, I believe one example that sticks in my mind is bus number 88 and 89.

Q. I understand now the other reason for discharge was he left the keys in the ignition at the terminal at the close of the day, is that right?

A. One of the other reasons was he had been repeatedly warned not to leave the keys in the bus. I explained to him the reasoning behind this, as it was turning to spring we were leaving the garage doors open. I didn't want any of the buses disappearing in the middle of the day.

[116] Q. Did you post any rules about this matter?

A. No, sir.

Q. Did you ever post any rules about the coffee breaks?

A. No, sir, it was taken on an individual basis.

Q. And with respect to the key incident you are satisfied the other people don't do that?

A. No, other people do do that and they are spoken to when it is brought to my attention that the key is left in the vehicle.

Mr. Santillo had a consistent habit of leaving the keys in the vehicle, and it was brought to his attention both by myself, Mr. Sulloway I believe spoke to him on a previous Thursday about keys in the vehicle.

Q. The Thursday before that Monday?

A. The Thursday before that Monday.

Q. That would be the 22nd of March?

A. Yes, it was either Thursday or Friday.

Q. What did he say to you at that time when you told him he was leaving the keys in the vehicle and shouldn't be doing it.

A. He said, "Sam left the keys in the vehicle."

Q. What did you do? Did you speak to Sam about it?

A. Yes, Id did. I have spoken to Sam on a number of Occasions.

Q. And the most recent was on that Thursday?

[117] A. Actually I believe the most recent time to date when I spoke to Sam about leaving the keys in the vehicle was Monday morning, the 26th.

Q. When you discharged him?

A. When I discharged him. I asked him where the keys to his bus were.

Q. Prior to that, the other warning on that was when, the prior Thursday?

A. I believe Mr. Sulloway spoke to him on Thursday or Friday.

Q. You didn't speak to him? Mr. Sulloways' job is what?

A. Garage dispatcher.

Q. And he came to you and told you that he had done it?

A. Yes, sir.

Q. As he told you names of other people?

A. Yes, sir.

Q. Have you spoken to them?

A. Yes, sir.

Q. Which employees come to mind that you have spoken to about this type of offense?

A. Sharon Ronco, I believe I spoke to David Wands about it.

Q. Anybody else?

A. Yes, I believe last Friday night I spoke to Joanne [118] Sliech about it.

Q. Were any of these employees discharged for that offense?

A. No, sir. It was all the first time I had spoken to any of them.

Q. You had spoken to each of the persons once?

A. Yes.

Q. How many times had you spoken to Mr. Santillo?

A. At least three or four.

Q. Spread over what period? We know the last time was when a dispatcher spoke to him on Thursday and you spoke to him about it the day you fired him. Before that how many times?

A. I do have a record. I believe he was spoken to on Thursday or Friday of the week, once by Mr. Sulloway, once by Mr. vanHorn and previous to that I can't recall the exact date.

Q. Speaking of Mr. VanHorn, are you aware of Mr. VanHorn's practice of sleeping in the vehicles while they are in the garage?

A. Yes, sir.

Q. This is on the clock, I assume?

A. No, sir.

Q. It was not while he was working?

A. It was not while he was working.

[119] Q. What time of day was this?

A. This was in the middle of the day.

Q. In the middle of the day he was sleeping?

A. Yes.

Q. Do you have a punch clock system?

MR. WELENSKY: I am going to object to this line of questioning.

JUDGE FISH: Overruled.

Q. Do you have a punch clock?

A. No, sir.

Q. Salary?

A. No, sir.

Q. How did he go about checking out to sleep?

A. It was on his time card.

Q. On his time card?

A. On his time card.

[123] Q. In terms of importance of the two offenses, leaving of the keys or the going for coffee and stopping at his house, which is the more aggregious, more serious?

A. I believe you have entirely missed—you keep asking about stopping at his house for coffee, stopping in the [113] morning for coffee, leaving his keys in his bus—you never quite to the point that I found he was stopping in the morning consistently for 15 minutes in the morning and in the afternoon, every afternoon 15 minutes or so for stealing time.

Q. Again, you have restated them and characterized them, but which is the most serious, the keys or the coffee breaks?

A. It's not a question of leaving the keys in the bus a single time, it's a question of him having been repeatedly told, given reasons, explained why we wanted to, one, see him after his run in case there were any problems with his run. See, the general procedure followed by most bus drivers is when they are clear with their run in the morning they come back in and hang up their keys.

[126] CROSS EXAMINATION

[127] Q. Now you had heard through a contact on the telephone to you that Mr. Santillo's bus was being parked on Alcon Drive every afternoon and obstructing Alcon Drive, is that correct?

A. Yes. The basic nature of the complaint was that the bus was at that time blocking the area. And as a matter of fact they added, "it's been here for a month."

Q. When you check that out with at least two employees of the company, is that correct—Sheila Kelly and Diane Saderopolis?

A. Yes.

Q. And both of those employees confirmed to you that in fact, every afternoon the bus was at Alcon Drive for some period of time?

[128] A. Yes, sir.

Q. Are both Sheila Kelly and Diane Saderopolis still working for the company?

A. Yes.

Q. Both are?

A. No, Sheila Kelly is not presently working.

Q. Diane is presently working?

A. Diane is presently working. Sheila will be doing a run on an on call basis, such as Friday resident runs.

JUDGE FISH: When did you confirm this with the employees?

THE WITNESS: That was in the conversations of late February.

JUDGE FISH: Late February you what, called them up?

THE WITNESS: I called them or they called me, or in the course of phone calls with them I asked them about this.

JUDGE FISH: And what did they tell you?

THE WITNESS: They told me yes, that it was parked.

JUDGE FISH: Every day?

THE WITNESS: Every day that they had noticed.

Q. They live on that street?

A. Yes, sir, one lives across from Santillo and one lives [129] two doors down, I believe.

Q. So Sheila Kelly lives on Alcon Drive, is that correct?

A. Yes, sir.

Q. Diane Saderpolis lives on Alcon Drive?

A. Yes.

Q. Sam Santillo lives on Alcon Drive?

A. Yes.

Q. Ed West lives in the same household as Mr. Santillo, is that right?

A. Yes, sir.

Q. That's his brother-in-law, right?

A. Right.

Q. And Nancy Danko lives on Alcon Drive?

A. Nancy Danko lives on Alcon Drive. And at the time there were others.

Q. Wait until I ask you a question, please. Now after receiving the telephone call from Mr. Maloney you brought this up to Mr. Santillo, is that correct? You discussed that with Mr. Santillo?

A. Each phone call I had from Maloney I discussed with Santillo, yes.

Q. Mr. Maloney called and said, made some statement about Sam Santillo having coffee or taking a coffee break, you discussed that with Sam Santillo, is that [130] correct?

A. Yes, sir.

Q. You also spoke to Mr. Santillo concerning parking his car on Alcon Drive in the afternoon, is that correct:

A. Yes, sir.

Q. And he denied that he was doing that, is that correct?

A. Yes, sir.

Q. Did you speak to Mr. Santillo about taking coffee breaks or breaks during the day, other than stopping at his house?

A. Yes, sir.

Q. And he denied doing it?

A. Yes.

Q. And when you questioned Mr. Santillo about this, he made the statement to you that the bus was rolling the whole time it was out, is that correct?

A. Yes, sir.

Q. Did Mr. Santillo have permission to make a stop at his house? Did you ever give him permission?

A. No, sir.

Q. To your knowledge was he given permission to make that stop by anybody else?

A. No, sir.

Q. Do you know if he was ever specifically told not to [131] make that stop?

A. No, I do not believe he was ever told not to make the stop.

Q. Now the first tachograph that was installed was March 12, 1979?

[132] A. Yes.

Q. And you stated that that was the test graph?

A. It was a test graph in the instrument when it was installed.

Q. And that had really, instead of having seven discs it only had three, is that correct?

A. That's correct.

Q. Is there a reason that you had a new tachograph, new instrument put in his bus on March 12?

A. Yes.

Q. What was the reason?

A. The complaints of him stopping at his house after his afternoon run, before returning the bus to the garage.

Q. You were concerned about—even though he had denied he was stopping—you were concerned that it wasn't true?

A. Yes, sir.

Q. Now drivers who have properly working tachographs in their buses, how are their hours determined for pay purposes?

A. Their hours are determined by reading the individual graph discs for the day in question.

Q. Are they paid according to the time on the tach? Is that essentially it?

[133] A. Yes.

Q. Now after the discs that came with the tachograph that was installed on March 12, were new discs subsequently put in?

A. Yes, they were installed on the previous Monday, or the following Monday, rather.

Q. That would have been March 19?

A. Yes.

I know we had discs for each day of the week for that next week beginning March 12.

Q. March 19?

A. That's correct.

Q. On the discs on the graphs for the week beginning March 19, you read those graphs?

A. Yes.

Q. Now you have heard Mr. Santillo testify that previous to having a working tachograph he was being paid for six and a half hours a day over a period of time. According to your reading of these graphs, was Mr. Santillo working six and a half hours a day?

[136] Q. (by Mr. Welensky) Mr. Patterson, again, based upon your reading of the graphs for the week beginning MOnday, March 19, according to your reading of these graphs did Mr. Santillo work six and a half hours each day?

A. No, sir.

A. Did he work less than six and a half hours each day?

[137]Yes, sir.

Q. What was the average time per day worked?

A. It was probably about six hours a day.

Q. Mr. Patterson, do you fill out a time sheet for payroll purposes that goes to the Medford office of the company?

A. Yes, sir.

Q. Did you fill out such a sheet for the week ending 3/25/79?

A. Yes, sir.

Q. And is this the sheet that you filled out?

A. Yes, sir.

Q. Did you put down the times for Mr. Santillo each day of the week Monday through Friday?

A. Yes, I did.

Q. Are these the times you recorded?

A. Yes.

Q. Are these times based upon your recording of the tachograph on each bus?

A. Yes.

MR. WELENSKY: I would offer that time sheet in evidence as Respondent's Exhibit 1.

[138;b JUDGE GISH: May I see it?

These hours are what, the hours he actually worked?

THE WITNESS: Those are the hours actually worked off the tachometer.

JUDGE FISH: For this week here?

THE WITNESS: Yes.

JUDGE FISH: And he was just paid for those hours?

THE WITNESS: Yes, sir, that was computed the same way that it was for our other drivers.

JUDGE FISH: But all the other weeks that Mr. Santillo was stealing time he was not paid for the extra time, or he was paid for it?

THE WITNESS: No, he was paid for six and a half hours.

JUDGE FISH: The other weeks?

THE WITNESS: The other weeks, yes.

JUDGE FISH: But not this week?

THE WITNESS: Not having a working tachograph, I asked him what his hours were for that week and when he left for lunch, when he got back in the afternoon, how many hours he was paid for.

[139] JUDGE FISH: Do you have a tachograph for just certain employees, certain buses?

THE WITNESS: No, sir. All buses have tachographs. I have approximately 24 buses and I have three or four spare tachographs.

JUDGE FISH: Your objection, Mr. Kennedy, is on the grounds—

MR. KENNEDY: I have one question on voir dire that I might ask.

These questions that are darkened are Santillo's hours taken from the tachograph, is that right?

THE WITNESS: Yes

MR. KENNEDY: Did you subtract, in computing this, the 10 minute break in the morning shown as down time?

THE WITNESS: Yes, I did.

MR. KENNEDY: And in the afternoon?

THE WITNESS: Yes, I did.

MR. KENNEDY: And when he went to his house?

THE WITNESS: Yes.

[126] JUDGE FISH: Aren't we actually arguing something that is not really in dispute? Even Mr. Santillo's own testimony admits that he did not work these hours. He is not disputing—he is admitting he took these breaks, he is admitting he took the coffee breaks. The question is whether it was something that justified his discharge or not, or something that he was discharged for.

So I don't really think it's all that essential

[144] Q. To make it simpler, is that the tach that comes in the graph instrument?

A. Yes.

Q. It covers a three day period?

A. Yes.

JUDGE FISH: What is the date of that?

THE WITNESS: This would cover Monday, the 12th on this chart here, Tuesday, the 13th on this chart and Wednesday, Thursday and Friday, you see, are all run [145] together on that last chart.

JUDGE FISH: So for the first document would be March 12, March 13 and the third document would cover 14th, 15th and 16th?

THE WITNESS: Yes, sir.

Q. Is for that bus B-219?

A. Yes it is.

Q. And that is Mr. Santillo's bus?

A. Yes, it is.

[146] Q. And would the inaccuracy you were talking about before relating to the Dodge busettes?

A. They were related to the Dodge busette, or any of the Chevy busettes, which the snow tires have been mounted on.

[147] Q. As far as you know, to your knowledge was the tachograph on Mr. Santillo's bus properly operating?

A. At what period of time?

Q. The last two weeks of his employment?

A. Yes, sir.

Q. When you took out the graphs for the week ending March 25, you testified that it did show your break in the afternoon, is that correct?

A. Yes, sir.

Q. And it also showed a break in the morning, is that correct?

A. Yes, sir.

Q. Now the route that Mr. Santillo is driving at the time of his discharge, how long approximately had he been driving that route?

A. There are minor route changes, additions or deletions, but the major run in question was the Chicopee run. And he had been driving that since December.

Q. So he had been driving the same route since December of '78, is that correct?

A. Yes, sir.

Q. So that is a period of three or four months, is that correct?

A. Yes, sir.

Q. So the last full week that Mr. Santillo worked with [148] a properly working tachograph in his bus, and that tachograph showed he was working approximately six hours each day, is that correct?

A. That's correct.

Q. And previous to that he, without a working tachograph in his bus, had been getting paid for six and a half hours a day-is that correct?

A. That's correct.

[149] Q. You testified you told him there were two reasons. One was the cheating on his time, the other was leaving keys in the bus. Is that correct?

A. Yes, sir.

Q. Did Mr. Santillo make any statement to you that he had contacted the union representative before coming in?

A. Yes, he did.

Q. And what did he say?

A. He said, "I was on the phone with the union"—I believe he said in Boston, "And they told me to call back. I told them that you were looking for me and they told me to call them back if, in fact," he got terminated.

Q. When you told Mr. Santillo the reasons he was being fired did he make any statements at that time?

A. Yes, he said "that's bullshit, you are firing me for union activities."

Q. And what did you say at that time?

A. I said, "I am not firing you for the union activities."

Q. Did he then ask you for a written reason for his [133] discharge?

A. Yes, he did.

Q. And what happened then? Did you give him a reason for his discharge?

A. No, I did not.

Q. Did you contact anybody about that?

A. Yes, I did.

Q. Who did you contact?

A. I contacted Mr. Richard Zimmerman.

Q. And did you tell him Santillo wanted a reason for his being fired?

A. Yes, I did.

Q. And what did he tell you?

A. He told me, "We don't have to give him a written reason. Ask him to leave the premises. Tell him he is not wanted back on the premises again."

Q. So you said that it was not because of the union after he had stated to you that he believed he was being fired because of the union, is that correct?

A. Yes, sir.

Q. And later that day did Mr. Santillo return?

A. Yes, he did.

Q. And was he with anyone else?

A. He was with John Adamski from the Teamsters union, and another member—another man was with them who I [151] couldn't identify.

Q. And what took place? Did you have a conversation with these people at this time?

A. Yes, I did.

Q. What was that conversation?

A. They came in, sat down in the office and said, "Why did you fire Santillo?" I told them I believe I did not have to discuss it with them. And they said, you're right, you're in a lot of trouble. You better have somebody from your main office give me a call, and Mr. Adamski left me his card, repeating his warning again as he left.

Q. You stated it was Mr. Santillo's habit to leave the keys in his bus, is that correct?

A. Yes.

Q. Are we talking about when he brings the bus back to the garage?

A. Yes.

Q. And you stated that Mr. Santillo had been spoken to about leaving the keys in the bus, is that correct?

A. Yes, he had.

Q. Had been spoken to the week before, is that correct?
A. That's correct.
Q. Was leaving the keys in the bus the main reason Mr. Santillo was fired?
[152] A. No, sir.
Q. What was the main reason he was fired?
A. Stealing time.
Q. It's correct that you knew that Mr. Santillo was in favor of the union?
A. Yes, sir.
Q. Did you know of other employees who have been favorable to the union?
A. Yes, I did.
Q. Do you know the names of those employees?
A. Yes. The last couple of days I had been writing a list, is it okay if I look at it?
Q. Would you refer to that list and tell us what other employees you knew were in the favor of the union?
A. Bob Allery, B. Arsanault, Marjorie Bailey, Joey Baer, Nancy Cook, Beverly Dudley, Edward Fleming, Mildred Hanson, May Holmes, Kenny Johnson, Robert Jencks, Judith Keeley, Ruth Levalley, Jenny Matavwitz, Rubin Nunez, Hilda Roughgoden, Mr. Santillo, Sue Strobell, Linda Soderbaum, David Stebbins, Ed West, Debbie Ward and of course David Wands.
Q. Did you have any belief as to who was the prime mover behind the union movement in the company?
A. Yes.
Q. And to your knowledge who was that person?
[153] A. David Wands.
Q. And how did you receive this information? How did you know that?
A. Through drivers coming to me, talking to them about it at Willy Ross School for the Deaf.
Q. You had been informed by other employees about Mr. Wands?
A. Yes.
Q. Is Mr. Wands still employed?
A. Yes, he is.
Q. The names on the list that you have read of people you knew that were for the union, would you recite the names of the people who are still employed?

A. Allvery, Arsenault, Bailey, Cook, Dudley, hanson, Johnson, Jencks, Keeley, Levalley, Matavwitz, Nunez, Roughgoden, Strobell, Soderbaum, Ward and Wands.

Q. Beside Mr. Santillo were any of the employees on that list fired?

A. No.

[154] REDIRECT EXAMINATION

[161] Q. By that time you knew of Santillo's involvement in the union?

A. By which time?

Q. By Friday or Saturday.

A. Yes, I believe I already testified to that.

Q. Was it Friday or Saturday that you knew about it?

A. Saturday.

Q. The conversation with Mr. West?

[162] A. No.

Q. You don't recall any conversation with Mr. West?

A. I recall a conversation with Mr. West on Friday night. I do not know what the conversation was.

Q. Didn't it involve Mr. Santillo?

A. Yes.

Q. Didn't it involve his union activity?

A. It could have. I do not recall.

Q. So you knew about Mr. Santillo's union activity by Friday?

A. By Friday 6:30 or so.

[163] MR. KENNEDY: One brief moment and I think I will be able to wrap this up.

Q. Just to get the timing correct, the tach from Mr. Santillo's vehicle was installed what day—Monday, March 19 was the first full week of the testing period, is that correct? The week ending March 25—

A. What do you mean by tach?

Q. The operating new tachometer?

A. The new tachograph was installed on the 12th.

Q. But the week of the 19th was the week that you used for testing, right, for purposes of his discharge?

A. Could I look at my calendar?

[164] Q. Sure.

A. Right, the 19th was a Monday. That would be the actual graph that was used.

Q. That was the graph that was used. Did you tell Mr. Santillo that the tach was being installed?

A. I believe Mr. Santillo was standing over Mr. van-Horn when it was installed.

Q. On the 12th?

A. On the 12th.

EXAMINATION

[165] Q. (by Judge Fish) I am a little puzzled by your testimony pertaining to your knowledge of the union activity of Mr. Santillo. I am unclear about it.

You said a number of times that you clearly knew about his union activities prior to his discharge. I am not exactly clear on how you knew—what was it that you knew with respect to Mr. Santillo?

A. That he was in favor of the union.

Q. On the basis of what did you make this decision?

A. I had had many conversations with very many drivers [166] When he asked me specifically, this one told me about this one—

Q. I am trying to understand—

A. I could name some of the drivers who told me about union activities but I couldn't tell which one was specific with which person.

Q. So what you are saying is that other drivers mentioned to you that Mr. Santillo was in favor of the union?

A. Yes.

A. And you have no recollection of the circumstances? I am trying to understand in what context an employee would come to you and say, "Hey, Mr. Santillo is in favor of the union," or these other employees. I am trying to get some idea of what happened.

A. Drivers would come in and say, "Well Dave Wands is trying to get a union together; he is talking to all the girls."

Q. This is your other employee?

A. This is David Wands, right. And this was another employee who volunteered.

Q. You don't remember the name?

A. I believe it might have been Diane.

Q. So Diane came to you and said, "David Wands—

A. David Wands is trying to get a union together down [167] at the school. And I said, "okay.'

Q. You just said okay?

A. What else could I say?

Q. Just try to remember. Give me your best recollection of what you said.

You said "okay" or something to that effect?

A. I said, "okay", listened and then I called the main office and said, "Well, we've got the same union thing down here too." They said don't worry about it.

Q. And with respect to Mr. Santillo, the employee would just come to you out of the blue and say, "Hey, Mr. Santillo is active on behalf of the union", or what? Why would they come to you?

A. Why would they come to me?

Q. Yes.

A. I try to treat my employees very fair. I have what I consider a lot of close friends among the people that work for me. They came to me on their own, or mentioned it to me in the course of conversations. It's kind of tough to describe what my job is like, but at times I am holding four conversations at the same time, one on the phone, one on the radio and two people in person asking me questions. And that goes on for about 12 hours a day.

The time that I have to sit down with the person on [168] a one to one basis is limited, so they generally call me and there's two more waiting to talk to me. There are other employees who came to me and mentioned that they had been approached by different people at the union or about the union.

Q. They had been approached by other employees?

A. By other employees about the union.

Q. Did they ask you what should they do about it, or what your view of it was or anything like that?

A. Yes they did, and I said I know a little about it and there's not too much I can do. And there were several employees mentioned who had talked to them at various schools.

Q. Some of these people told you that Mr. Santillo was among those who had approached them and tried to solicit their support for the union?

A. I believe one or two told me that Santillo had approached them and was talking about the union.

There were also others, basically the names I have mentioned were derived from drivers coming to me saying, "So-and-so talked to me at the school about the union."

Q. On all of these occasions with the exception of the ones that you testified to on questioning of Mr. Kennedy

were instances where the employees came to you and voluntarily told you they were approached by this [169] employee or that employee?

A. Yes, sir.

Q. The only time you initiated it was on that one occasion?

A. David Stebbins, yes. This is to the best of my knowledge.

Q. I want to go back to this conversation that you had on the phone with Mr. Santillo. Well, let's backtrack.

Prior to that there was a conversation with Mr. West that initiated this call with Mr. Santillo?

A. Yes.

Q. Do you recall that conversation?

A. No, I don't recall that specific conversation with Mr. West. Okay, I can recall when it probably took place was on a Friday night when he was waiting for his kids from Perkins to come in between trying to get the buses and dealing with all the stuff at six o'clock on a Friday night.

Q. You don't recall having any conversation with Mr. West in which Mr. Santillo's union activity was discussed in any fashion at all?

A. No, sir.

Q. Let's stick to the conversation between Mr. Santillo and yourself. He called you and he started out, tell me [170] again now?

A. This was—

Q. Which conversation?

A. The phone conversation?

Q. Yes, whether at 6 o'clock at night or 11 o'clock in the morning, where he told you about his conversation with Mr. West. He told you Mr. West had said he had said something to him—that is what I am interested in.

What did he tell you?

A. He told me, "Eddie just come home and told me you were pretty upset," and he says, "Look, there's nothing personal bout this. There's a lot of people who want it. I am not the person who is pushing it. Everyone wants it."

Q. A lot of people want it?

A. There's a lot of people who want it. I know you have done a lot of favors for me, like when he got thrown out of his house he come over my house for dinner.

Q. You had no doubt he was talking about the union at that time?

A. No.

Q. There was some confusion earlier in your testimony. Anyway, you didn't have any discusion with Mr. Santillo about what you had said to Mr. West or what you [171] hadn't said?

A. No, I don't believe I did. I couldn't recall the conversation.

Q. When he said to you that everybody else wants it and there is nothing personal and all that kind of conversation, what did you say to him, as best you can recall?

A. All I can recall is my warning not to discuss union activities with anybody.

Q. And did you say that?

A. No, I didn't.

Q. You don't recall what you said?

A. No, I was still rather upset.

Q. Upset about what?

A. One, I knew he was cheating on his time from the conversations and that he had lied to me in the past, and had [172] just given me, to quote him, a whole bunch of bull and I just didn't want to deal with it anymore. So the conversation ended.

Q. You were only upset about his time?

A. I was upset about the time and the union, being in about my 70th hour of work. I was pretty much upset at that time.

Q. What was the date of this conversation?

A. To the best of my recollection it was Saturday.

Q. What date?

A. Saturday the 24th.

Q. At that point had you decided to discharge Mr. Santillo?

A. It was in my mind, okay.

Q. It was in your mind when?

A. To sit down and read the tachograph, which I normally did on Monday mornings. I was in there for Saturday for some reason, I can't even recall what it was. And I was in and out.

I had glanced at the tachograph Friday right and I saw that he was stopping when he said he wasn't.

Q. Friday night you saw—

A. Friday night when I pulled the tach out I looked at it, you know, reading the tachograph takes about 15 minutes apiece to go through.

[173] Q. So you looked at the tachograph and saw these gaps?

A. Yes.

Q. But at that moment you still hadn't made up your mind to discharge him?

A. No, sir.

Q. And subsequent to this you read the tach on the 25th and saw these gaps and called him in and had the conversation?

A. I called him in and discharged him at that time.

Q. It was still on this Friday evening, you looked at the gaps on Friday evening?

A. Right, it was pulled out and I looked at it. I saw the gaps in the afternoon, which is when he had said he wasn't stopped and, in fact, the graphs showed that he was. So I was upset about that.

Q. And you had the phone call and he said what he said. Then what?

A. I believe the call was on Saturday.

Q. Saturday, okay—the end of the day Friday, five or six o'clock—

A. No, it's seven or eight.

Q. You got these tachometers in front of you and you have seen the gaps but you haven't decided to fire him yet, but you were upset.,

Then he calls either late that evening or Saturday [174] morning and he said what you testified he said. And you still hadn't made up your mind yet to discharge him?

[174] A. It was fairly well along in my mind to discharge him.

Q. Along in your mind?

A. Someone who works for you for three years, you don't dump on the end. I went through and I just thought about the whole history of what had gone on. It's not an arbitrary decision to fire someone who has worked for you for so long.

The decision was made when I came right down and read the tachograph on Monday morning.

Q. In other words, it was on your mind on Friday but you hadn't really formulated it?

A. It was in my mind since the end of February.

Q. When you put in—

A. When I had the conversations with the drivers.

Q. It was more in your mind and the conversation came and you didn't do anything about it on Saturday?

A. No.

Q. Were you in on Saturday?

A. Yes, I was in on Saturday.

Q. Why didn't you read the tachometer notes on Saturday?

A. It didn't occur to me on Saturday.

[175] Q. But on Monday it did?

A. On Monday when I do the regular payroll, as part of my regular Monday morning routine, I sit down and I read all the tachographs. And as I read them I write them down by day in the order that I come to them.

And then when I came to Santillo's tachograph I found that he was in some instances five hours and forty-five minutes, five hours and fifty minutes. That's when I said—

Q. Was your decision in any way affected by the conversation that you had with Mr. Santillo on Friday night.

A. It was hampered.

Q. I don't follow.

A. Having been cautioned against union activities, I was hesitant about firing him, and knowing his involvement in the union. I really didn't know what to do, and I spent the whole weekend one, trying to find a driver to do his run, and it's easy to get another class 2 bus driver on a moment's notice.

When I did finally, Monday morning, read the tach, find out he was really giving it to us on his times—

Q. That is what I am trying to say. You knew that Friday, didn't you?

A. I knew Friday night he was stopping, but I did not [176] know the actual extent of it, no. And Monday morning when I read it, that was it. I then decided to replace him.

Q. Did you talk to Mr. vanHorn before you did it?

A. I had Mr. vanHorn free for the afternoon.

Q. That is who you used?

A. He went out to do the run, yes.

Q. So it was Monday morning, then, after you read the tachometer when you decided that your suspicions were confirmed and he was cheating, and therefore now you had something to back it up with?

A. Hard fact.

Q. So this was when, sometime in the morning?

A. This was in the morning, yes. What had happened was Santillo had gone out on his run. I was somewhere in the office. I don't believe I saw him Monday morning. He came back. While he was out on the run the decision was made to let him go.

[178] Q. Then you made the decision without discussion with Mr. Zimmerman or any higher ups?

A. No.

Q. And then you testified, I believe, that Mr. Santillo came in or you called him in, and you informed him—

A. What was in my mind was, when he came back in from his run, when he brought his keys back to hang on the board to get him then. But evidentally he just left the keys in the bus and walked out of the garage without seeing anyone.

At that time I had drivers in with me and we called him at his home, we called him back in.

Q. Then he came back in and you told him, did you just start in by saying "you're fired" or what?

A. Yes, sir.

Q. Did you give him a reason?

A. Yes.

Q. What did you say?

A. Stopping for breaks—and incidentally I asked him where his keys to the bus were. He said, "I don't know." VanHorn went out and the keys were in the bus and I sent him out to pull his tachograph for that morning.

[179] A. He asked why he was being fired? Yes, he asked why he was being fired and I told him.

Q. And then the discussion that you testified to came up pertaining to the union, and according to your testimony it was initiated by Mr. Santillo, rather than yourself?

A. Yes.

Q. And then he asked you for a written document?

A. Then I asked him to leave.

Q. Then you called Mr. Zimmerman and had a conversation. Try to tell me as best you can recall about that conversation.

At this point Mr. Zimmerman was not even aware that you were going to fire him, is that correct?

A. No, sir, I don't believe he was. I hadn't had any conversations with him because I know if I talked to Zimmerman about the whole thing.

Q. You started off the conversation with Mr. Zimmerman. What did you say?

A. I said, "I've got a driver here and he has been cheating on his time." He says, "Do you have the graph?"

I said, "Yeah."

He said, "What else?"

I said, "He left the keys on the bus."

And he said, "Fire him."

[180] Q. Is that the extent of the conversation?

A. No. I said, "I've got union activity going on. What should I do?"

And he said, "Don't give him a reason. We haven't given one in the past."

Q. You mentioned about union activity? You said, "We have union activity going on?"

A. Yes.

Q. Did you say that the man you fired was part of the activity or was part of the union? Did you say that?

A. I don't believe I did. I'm not exactly sure. I knew he was interested in the union—interest, active, leader whatever.

Q. You didn't say any of that to Mr. Zimmernan?

A. Yes, I did, when he asked for the note. When Santillo asked me for the note, I gave him the facts as best I knew.

Q. What facts did you give Mr. Zimmerman with respect to Mr. Santillo's union activities?

A. That he was interested in the union. And the basic conversation was about the written notes.

Q. I am trying to find out—were you trying to out whether to affirm the decision to fire him, or whether you should give him something in writing?

A. Basically to reaffirm—what do you mean to reaffirm?

[181] Q. I am trying to find out why you mentioned to Mr. Zimmerman about the union if you had already made the decision to discharge. What is the difference?

A. To brief him on all of the facts.

Q. But the purpose of your call was to ask him whether you should give him something in writing?

A. Yes.

Q. So with respect to that question, you felt it was important that he knew Mr. Santillo was interested in the un-

ion, as to whether you should give him something in writing, is that correct?

A. Yes.

Q. And waht did he say?

A. He said, "No, we've never had to give anything in writing. Tell him to leave."

Q. Mr. Zimmerman made no comments about the union?

A. No, sir.

[182] Q. So it's basically your testimony, then, that the rule with respect to drivers is, they are not supposed to be taking any breaks?

A. They are getting paid to pick up kids, that is what they should be doing.

Q. And it's also your testimony it does sometimes go on, but whenever the company finds out about it they take steps to stop it?

A. Steps are taken to relieve it, yes.

Q. What steps has the company taken?

A. In which instance?

Q. In any instance?

A. In the case of Mr. Santillo he was told not to do it.

Q. Let's talk about that. In the case of Mr. Santillo, you say has been a problem for how long?

A. When it was first mentioned that he had stopped for coffee and he said he was not going to do it, I figured it was solved then.

Q. That was some months back?

[183] A. Yes, some months back.

Q. You said he shouldnt be taking coffee breaks. He at that time—

A. Said, "I don't know it was wrong. I won't do it."

Q. He didn't know it was wrong and promised that he wouldn't do it?

A. He said he would stop, yes.

Q. And he did stop for awhile, or you don't know?

A. We don't know.

Q. You didn't hear anything about it?

A. I did not hear to the contrary.

Q. Until when?

A. Until I discovered it on reading his tachograph on Monday morning, the 26th, that would be the morning gap for 15 minutes.

Q. You had this problem with some other employees as well about breaks or any kind of breaks?

A. I would call them unexplained stops, and when I discovered one I called it to the driver's attention, found out what it was, and then either remedied it with an admonition or, in the case of an afternoon route, gave him more kids to take home.

You know, if a driver clears a junior high school before picking up any elementary school run and he's got 10 or 15 minutes, I gave him some more kids to take home.

[184] Q. And there were times when you spoke to other employees about these unexplained breaks? What would they say?

A. They would either correct the situation, or if the unexplained breaks would come before their afternoon pick up, which means they are arriving at the school way too early and expecting to get paid for that, that we solved with, "Well, leave the garage 10 or 15 minutes later."

Gaps between, in the afternoon, between the junior high school drop offs and the elementary school pick ups, I remedied that situation by giving them more children.

The morning situation, gap in the morning, a driver was stopping for coffee on the way out. So I said, "Fine, I'm not going to pay you for stopping for coffee." It was a five minute stop there.

Q. Who was that?

A. Thomas Allery. He used to stop at Friendly's on the corner of Boston and Gay.

Q. Where was this?

A. This was in the morning.

Q. When was the discussion you had with him?

A. September of the previous year.

Q. You found out that he was stopping at Friendly's?

A. I asked him. I called him in and I said, "I've got a gap in your graph here. What is it?"

[185] And he says, "I'm going out and I'm stopping for coffee."

I said, "Well, I am not going to pay you for a coffee break."

He said, "Fine."

So I just paid him for his driving time.

Q. He is not supposed to stop for coffee?

A. He had no children on the bus at the time. He was not causing any undue lateness on any of his arrival times

at school. So I told him I just was not going to pay him for his stop.

The stop was at 6:30 in the morning. He would leave the garage.

[186] Q. What you are saying is some breaks are allowed and some are not?

A. No. Mr. Santillo was charging me for time that he was stopped because he did not have a tach on. These other were determined from reading the tachograph charts.

Q. I understand that. What I am trying to understand is—it's a little confusing to me. You have to understand, I am not in the industry. I am trying to understand, what is the rule?

If I am a new employee, do you say anything to a new employee when you hire him about what kind of a rule you have or what kind of policy there is with respect to taking a break? Do you say anything about it?

A. No, the runs are set up so they go in the morning—they work basically two hours in the morning and two hours in the afternoon, the bus drivers—or whatever [187] their afternoon run is, is continuous from when they leave the garage to when they get back. If someone is leaving the garage 10 minutes early to go sit in the street corner and get a cup of coffee, no.

Q. No what?

A. They are not being paid for it. They should not be paid for it.

If a driver is stopping in between his runs in the afternoon, or if a driver has a lag between his afternoon junior high school run and his afternoon elementary school run—junior high schools get out at 2, ten minutes of 2, quarter of 2; elementary schools get out one hour later.

so what happens is they pick up their junior high school run at quarter of 2, drop all those kids home, go for 10 minutes of three, or quarter of three or 2:30 or whatever their elementary school pick up is, pick up those kids and then take them all home, then return to the garage.

That is the afternoon. In the morning they pick up their junior high school kids, drop them for 9:10, go out and pick up the elementarys and drop them for 9:10.

Q. But let's say given the example that they drop off junior highs first?

[188] A. In the morning, yes, junior high school.

Q. In the afternoon they bring home the junior high first at, say, 2:30—whatever it is?

A. Quarter of two.

Q. So at quarter of two they take them back. Now he is supposed to go to pick up the elementary school—what is that?

A. That is anywhere between 2:30 and 10 minutes of 3.

Q. That is at the school?

A. At the schools.

Q. What are they supposed to do between quarter of two and two-thirty?

A. Drop off their kids.

Q. What if they drop them off by 2:15 or 2:20, and they don't have to pick up the next group until 20 to 3. What are they supposed to do then?

A. That is a rare example but when that is found we give them more kids to take home.

Q. Well, if they are out in the middle of the road you are not going to give them more kids?

A. No, when that situation is discovered more kids are added.

Q. Let's take that example that I have just given you, twenty after two, let's say. He has finished with his elementary school kids and doesn't have to pick up his [189] junior high school kids until 10 to 3, whatever.

Q. He goes to the junior high school and waits.

Q. He waits? He is not authorized to go to take a cup of coffee?

A. . He can go take a cup of coffee.

Q. He can?

A. Yes.

Q. In that situation he is allowed to do it?

A. That is a rare situation. It was discovered with one driver, John Walker, that he had time in the afternoon between his jur'or high school and his—

Q. Well, I would think, aren't there times when traffic situation and weather and the amount of kids that you have, there is going to be a variance in the time that one is going to have between stops?

A. Yes, but generally runs are set up on a very tight schedule. This is in the afternoon. That would be allowed. There would be nothing wrong with that.

But say the driver had to pick up at quarter of two their junior high school. They left the garage at quarter after

one, left the junior high school at 1:30 and sat there for 15 minutes. I wouldn't pay the driver for that 15 minutes and I would call him in, as in the case of Mildred Hanson, I said, "Look, leave 15 minutes later for your school." And that closed that gap and [190] solved that problem.

Do you want to try the morning again?

Q. I guess it wold be the same. Basically, what you are saying is that some breaks are allowed and some aren't, that is what it seems to come out to. Is that—

A. Yes. The basic involvement is the kids. In Mr. Santillo's case, he had an hour to pick up his junior high school kids, get them into junior high school for 8:10, then go right out and get his elementary schools in for 9:10, an hour later.

What Mr. Santillo was doing was leaving the garage early, dropping his kids at 10 minutes of 8, twenty minutes before they have to be in school. And then going on and taking his break in there and then going on and doing his elementary school pick ups, running in his schools at the elementary schools late.

Q. So he would be coming late—

A. He would be coming late into the elementary.

But the basic problem was in dropping his junior high school kids 20 minutes before they could have been in school.

Q. And you never really found out that this had occurred again until the 25th?

A. Monday morning.

Q. This was the first time that you heard that, "Well, he's [191] now he's doing this again"?

A. Yes.

Q. Prior to that your initial annoyance that you testified you were upset about was only in reference to the fact that he would be going home in the afternoon?

A. Right, that was the complaint which I checked out with the other drivers, yes.

Q. Again, so my question to you still is—my original question—you don't say anything to people at the time you hire them about what policy there is and whatever? That is just something that comes as it goes along, you tell them?

A. You know, it's not as if you are working in a factory and you get a 10 minutes coffee break. You've got kids to get to school. You are restricted by chapter 766 that says

you have one hour, and that's pretty much it. One run follows the other run.

Q. And now this business about the keys you also talked about is another basis for discharge, that he would be leaving the keys in the bus. And you said he was spoken to about that by yourself on a number of occasions?

A. By myself, I had spoken to him and even explained to him the reason.

Q. Which is what?

[192] A. Which is that it was getting warmer now. We are leaving the garage open. I don't want anybody to steal the bus, you know, I don't want anybody in the bus.

Q. This was in the garage now?

A. This was in the garage, but the garage is open at both ends. It's 12,000 square feet, and there were at that time no windows in the office.

Another reason was the message system of communicating to the bus drivers is when they come in for their afternoon run or their morning run they pick the keys and messages—additions, deletions, change in addresses and so forth.

Mr. Santillo not bothering to pick up his keys because they were already in the bus, he was missing his messages.

Q. When you spoke to him about this what did he say?

A. He said, "Okay", and he'd so it for a couple of days and then off again, you know, we would be chasing him down again.

Q. Now you talked also about this business about stopping at his house for 10—whatever amount of time. Now that is something that is completely unauthorized, right?

A. Essentially what he is doing is he is hopping in his bus and he is driving out of the garage at 2 o'clock, [193] and then he is coming back at 5:30 and saying, "I've worked all that time:"

And then we find he has been taking 20 minutes, half an hour stopping at his house on the way back to the garage.

Q. So this was on the way back to the garage?

A. This was on the way back to the garage in the evening, after he had cleared his last run.

Q. This was after he had cleared his—

A. After he had cleared his last run of all his kids. He was coming in consistently at 5:30 and putting in his time until 5:30, when in essence he could have been back at 5:10.

Q. Then he was supposed to punch out at 5:10 and you would only pay him up until 5:10?

A. Until 5:10, but he had on two occasions said, "When I am out, the bus is rolling."

Q. And you spoke to him about this—you said you did speak to him about this on a couple of occasions?

A. Yes, on two occasions. The first occasion was the first incident of coffee breaks in the morning. And the second instance was after I had had reported the—

Q. Did you ask him specifically whether he did what you said he did, i.e., stop at your house on the way back?

[194] A. I believe I did.

Q. He said—

A. He said no.

Q. Never did it?

A. That's correct.

Q. Was this before or after you had received these reports from these other employees that you mentioned?

A. This was the second warning, after I had talked to the—

Q. What do you mean, the second warning?

A. The second time I told him not to stop. And the second time he had told me—

Q. Wait a minute. Start over.

So you told him not to do it this time? I thought you testified earlier you didn't te-l him not to?

A. To specifically stop at his house—

Q. You did?

A. I asked him if he—

Q. You asked him if he was stopping?

A. He said no, when the bus is out—when I am in that bus, the bus is rolling.

Q. And was that the extent of the conversation?

A. That was the extent of the conversation.

Q. That is what I am saying—

A. If someone says he isn't, someone says he isn't.

Q. That is what I am trying to find out.

[195] But at that time you didn't tell him, "You know, you are not supposed to be stopping. You are supposed to come right back after your run."

A. That should have been understood on his part.

Q. But you are not sure that you said?it?

A. I don't know if I specifically spelled out, "Look, don't—"

Q. Your testimony is obviously by you asking he should have known that he shouldn't be doing it?

A. Yes, you know, he had only been working for me for three years or so.

Q. And then this last time you spoke to him was when about that—the last time prior to the discharge?

A. About stopping?

Q. Yes.

A. That was after I had received and confirmed the complaint about his stopping on the way home.

Q. You confirmed with those other employees that you mentioned?

A. With the other employees, yes.

Q. Now did you mention to him at that time that you had checked it out—that "I have evidence from other employees or other people that live on your block that specifically tell me that they have seen your bus?"

A. No, I did not. As a matter of fact, I don't believe [196] I checked with the other employees until after I had talked to Santillo about it. I got the anonymous call; I talked to Santillo about it and when he had repeated—

Q. Let's try to get the time frame.

Q. In chronological order?

Q. Yes.

So you spoke with Santillo about it about when, the last time?

A. I believe it was the end of February.

Q. And after that?

A. The first time I spoke to him was the previous year, okay, October, November, December, we weren't quite sure of the time—

Q. Yes, the coffee break. I mean stopping at his home.

A. The second time of him being told not to stop was after the anonymous phone call. Okay, and I got practically verbatum the same response that I had gotten the first time. That is when I checked.

Q. And after that you checked with the—

A. After that I had the—

Q. You checked with the employees there after—

A. After this conversation.

Q. But you didn't confront him again after that, or ask him about it after that?

[197] A. No.

Q. Even thought you had evidence from employees, now wanted to—

A. I wanted to install the tachograph and get evidence.

[198] JUDGE FISH: That is all I have.

Mr. Kennedy, do you have any questions on anything I have asked?

MR. KENNEDY: Yes.

Q.

(by Mr. Kennedy) How did you find out that Mr. Santillo was dropping junior high school kids off 20 minutes ahead of schedule?

A. By reading the tachograph.

Q. By reading the tachograph?

A. Yes.

Q. You didn't get it from the school department?

A. No.

Q. You didn't get any complaints from the school department?

A. No, I didn't.

Q. And again you weren't talking—

A. The kids he was driving I believe were retarded and they couldn't really come right out and complain.

Q. And that was just the morning right? He was only actually, as far as the tach was concerned, when you pulled the tach it was determined through the tach that he [199] was dropping these kids off early?

A. Yes.

Q. But that didn't apply in the afternoon?

A. No. In the afternoon when he was finished dropping these stops, when he had finished dropping off all his kids he stopped at home before returning to the garage.

[202] Q. (by Mr. Kennedy) Now you said that Mr. Santillo was leaving the barn at 7?

A. I don't believe I—

Q. What time—

A. I believe he left at 6:30. If I saw a tachograph I could show you.

Q. This is Respondent's 2, and I am giving you the day of the critical week of 19th.

[203] Okay, this is on Monday, the 19th. We've got him leaving the garage at 6:45, stopping at 7:45, okay, resuming at about five minutes of eight and going on again until 9:10.

Q. So it's a 10 minute break from 7:45 to 7:55?

A. It comes out to about 13 minutes.

Q. Okay, now—

Q. Yeah, about 10 minutes.

A. Ten minutes, all right.

[204] Q. (by Mr. Kennedy) In the installation of this graph into the machine, if the paper were to be turned slightly in either direction, a person who actually was leaving at 7 would appear to be leaving at 6:45 or 7:15?

A. That's correct. That is where we match it up with the time they left the garage.

Q. There's no punch out at the garage?

A. There's no punch out at the garage.

Q. All right. So that we have to believe, because it was admitted by Mr. Santillo on the stand that he took three 10-minute breaks, and the chart clearly shows the breaks? The dispute, however, is the gravity of the breaks.

And you introduced this graph to show the gravity, to wit, that the breaks are causing him to pick up the children earlier. My Santillo's testimony is that he was leaving at the proper time, seven o'clock, and that actually he didn't delay to drop off the children at school, and took the 10 minute break after that first drop off.

And any explanation I can offer in that regard is up to you. Is it possible and you said yes, if the chart is pushed one way or the oterh it will show a difference of from 10 to 20 minutes.

[205] A. Okay, if that is the case Mr. Santillo is leaving the garage at 7, as you say, and arriving back at 9:30. So that would indicated that it is installed off center. If it shows up earlier on one end, it will show up later on the other.

Q. That is what I mean, that's all I say.

Q. As a matter of fact, here we have Mr. Santillo not going over 22 miles an hour the whole way, and not going over 30 miles an hour on the way to Sunshine.

Q. Well, I don't know the speed perspective but I just say it's justified there if it's put in off center, and the tach looks like the man is actually playing games with pick up and delivery of children when, in fact, he was not.

That is what I am concerned about, is that meas-uring.

A. No, he was—okay—

MR. WELENSKY: There is no question before the witness.

MR. KENNEDY: It was asked and answered. he said that if it's off center—

JUDGE FISH: Whatever he said is on the record.

Q. Is that correct, Mr. Patterson?

A. Without the time to go by—Santillo did, in fact, leave the garage at seven every morning, it would show up on the graph at seven. Or, as it does here, 6:45.

[206] Q. But what is printed there could be off by the setting one way or the other?

A. Yes.

Q. I said, very simply, did the parents complain to you about having to deliver the child to the bus 10 minutes earlier?

A. No, they didn't.

Q. So your basis for taking action against Mr. Santillo [207] for theoretically dropping children off earlier than usual to get a coffee break, based on a graph which you said might very well be off center.

Two, even though you felt he was dropping them off earlier, there were no complaints from the parents about this? Is that correct?

A. That's correct.

[208] MR. KENNEDY: That is the 19th day of March, Monday, the 19th.

A. What is the question?

Q. Do you see a 10 minute break?

A. Yes.

[209] Q. And that 10 minute break would be between—

A. Between 2 and 2:10 yes.

Q. And that break was also, the graph shows, between two pickup and delivery sets?

A. Right.

Q. So my question to you that developed in my having had a recess on this issue, is that if he could do the 10 minutes in the afternoon why could he not conversely do it in the morning, without having to impose any form of early pick up on the children?

A. The early pick up—

Q. Assuming arguenndo, because I think—

MR. WELENSKY: Objection—

MR. KENNEDY: He is not answering my question.

Q. Assuming arguenndo that the graph was off and that it should have been callibrated for seven on the nose, and that that could be wrong?

A. Yes.

Q. If that could be wrong, why couldn't the 10 minutes that he honestly obtained—which I think you testified he obtained without manipulation in the afternoon—could be obtained equally without manipulation in the morning?

A. Again, the pick up time of the children is in question.

[210] Q. Don't measure the pick up time to the graph. I am assuming the graph is callibrated to seven o'clock.

A. Okay, that would have added 15 minutes onto the end of the day. He conceivably would have been dropping his elementary school late.

Q. Oh, I see what you mean. You are talking about the afternoon?

A. No, this is the morning, dropping the elementary school late.

Q. Dropping the elementary school late?

A. Yes.

Q. What time would it show the break?

MR. WELENSKY: Well, is the question hypothetical, or is—

MR. KENNEDY: He is measuring the hypothetical with the help of that instrument.

The hypothetical being that the chart itself is off in terms of his starting time, that that time should be seven.

A. Right.

Q. And waht does the graph show his starting time as?

A. A little after 6:45.

Q. All right, so that's about a 12 minute factor. If you were to add that 12 minute fctor into this, where the break begins, move that over 12 minutes, where would [211] that show he started his break?

A. (No response)

Q. Right now it shows he is starting his break when?

A. About quarter of 8.

Q. That would show his break about two minutes of eight, right?

A. Starting his break at two minutes of eight.

Q. How would that interfere with the children?

A. That would have them getting into school, driving one mile to the coffee shop to be there for two minutes of eight, which means he's still dropping off considerably before the time they are due in school.

Q. If he were dropping them off considerably later than he should wouldn't the school authorities be complaining about it?

A. No, sir. He is dropping them off and is at the coffee shop at two minutes of eight. They don't have to be in school until ten after.

Q. I see, so you are saying whereas before you thought he was doing 20 minutes ahead of time, now you closer to 12 minutes ahead of time?

A. Yes.

Q. And you still consider that equally aggregious, an equally serious offense, 12 minutes ahead of schedule, children who are in some cases retarded?

[212] A. On a consistent basis after he had been admonished not to do this, yes.

Q. I though he was admonished not to do it on a 20 minute basis?

A. He was admonished not to stop at all.

[213] EDWARD WEST

was called as a witness by and on behalf of Counsel for the General Counsel and, having been first duly sworn was examined and testified as follows:

[214] Q. And as earlier testified to by Mr. Santillo, Mr. Santillo is your brother-in-law?

A. Yes.

Q. Directing your attention to about 7 p.m. on the night of Friday, March 23, 1979, did you have a conversation at the terminal with George Patterson?

A. Well, every other Friday night I had what they called a resident run. I walked into the office and Mr. Patterson he asked me, he says, "What's with Sam and the union?"

I said, "I don't know nothing about it, other than Sam had a lot of people complaining to him. And him being him, he just wanted to help them. That's all I know about it."

So rather than stick around and take sides, I just went back out into the garage and walked around and waited for my run to come in.

Q. Did he say anything to you in response to that? You said you didn't know, you said people complained to him and knowing Sam, he would do something about it?

[215] A. Yes.

Q. What did he say in response to that?

A. Well about he was taking it personal and referred to at that time Sam had his truck parked there, and that he was letting him take time off in the summer for his own personal job, which is running the fair circuit.

Q. He was referring to these as favors he had done for Sam?

A. Yes.

Q. And what did he say about that?

A. Wait until he wanted them again. So I took it like that was the end of the favors, he's had to find another place to park his truck and when it come time to get another driver to do his run, he's going to be out of luck.

Q. Could you tell us what that meant, a back up driver—

A. Well, he didn't say back up driver, but you had to have a back up driver, okay, that is the company policy.

Q. To move this along, is it correct that Sam has a job where he works various fairs and runs a booth?

A. Yes.

Q. And he asks for time off at certain times, is that right?

A. Right.

[216] Q. And Patterson had been letting him have that time?

A. Right.

Q. And that is what he was referring to?

A. Right.

Q. Now did you relate this conversation to anyone after it happened?

A. Yes, after I did my run I went home and I told Sam about it.

Q. Did you have a practice of taking coffee breaks?

A. Yes.

Q. And did you do this on the clock, your work time?

A. Well I just ordinarily stopped if I was between runs, I just stopped.

Q. Have you seen other people take coffee breaks at the company?

[217] A. I seen vehicles at different coffee shops, restaurant,s what have you.

Q. These are clearly marked Transportation Management?

A. Yes.

CROSS-EXAMINATION

[218] Q. You stated that you have taken coffee breaks?

A. Yes.

Q. Were you ever told not to take coffee breaks?

A. No, I wasn't.

Q. Were you told not to stop and take breaks?

A. No, it was never mentioned to me.

Q. How often did you take these coffee breaks?

A. Whenever I had the opportunity. Whenever there was no kids on the bus or in between runs.

Q. And how often did you take them?

A. Everytime I went out.

Q. Every day?

A. Yeah, definitely every day. Sometimes once a day, sometimes twice.

Q. How long did you stop?

A. A few minutes.

Q. How many?

A. Five minutes, somewhere around there. Just enough to drink the coffee and get going.

[219] Q. Drink your coffee and leave?

A. Yeah. I didn't sit around. I just drank my coffee and left.

Q. And in the statement you gave to the National Labor Relations Board didn't you say that you would stop for two or three minutes?

A. I said two, three, four or five minutes.

Q. Okay, my question is, your statement you gave to the National Labor Relations Board—

A. Well, if it's there—

Q. Let me finish.

A. Okay, finish the question.

Q. In the statement that you gave to the National Labor Relations Board didn't you say that you stopped for two or three minutes?

A. If it's there and I signed it, yes, I did.

Q. That is your statement?

A. Yes.

[221] JUDGE FISH: I just have one question.

When you had the conversation with Mr. Patterson, you said something that he said to you something about he was taking it personal. I didn't quite understand.

What exactly did he say?

THE WITNESS: I don't know exactly what he meant

by—

JUDGE FISH: No, I am not asking you what he meant. I am just asking you what he said.

THE WITNESS: That's exactly what he said, "I'm taking it personal. When he wants a favor—you know, referring to parking his vehicle and time off to do his—"

JUDGE FISH: And what?

THE WITNESS: Time off from driving to do his own—he has a stand, he runs a fair stand in the summer— time off for that or to park his vehicle. The way it come across to me that the privileges—

JUDGE FISH: NO, I want to know what he said.

THE WITNESS: Okay, thats what he said.

JUDGE FISH: What?

THE WITNESS: You know, when he wants a favor, I'll remember it.

[222] JOSEPH F. BAER, Jr.

was called as a witness by and on behalf of Counsel for the General Counsel and, having been first duly sworn was examined and testified as follows:

THE WITNESS: Joseph F. Baer, Jr., 86 Elmer Drive, Chicopee.

DIRECT EXAMINATION

Q. (by Mr. Kennedy) Are you here under subpoena?

A. Yes, I am.

Q. Were you formerly employed at Transportation Management?

A. Yes, I was.

Q. During what period of time?

A. From October of '78 to April of '79.

Q. What was your job there?

A. I was a driver and did mechanical work in the garage.

Q. Do you work nights, Mr. Baer, as a musician?

A. Yes, I do.

Q. Directing your attention to Thursday, March 22, 1979 [223] at about 10 p.m. while you were working at a place in Holyoke called the Train Stop, did you have a conversation with George Patterson?

A. Yes, I did.

Q. Was a customer?

A. Yes.

Q. Had Mr. Patterson ever shown up at any of the other places such as the Train Stop where you worked before?

A. No, he hasn't

Q. MR. WELENSKY: I will object to that. He would not have known whether or not—

Q. Did you see him at any of the places that you worked before?

A. No, I have not.

Q. You never talked to him at any of the places where you performed as a musician?

A. No, I didn't.

Q. Tell me what he said to you on that Thursday night.

A. He asked me if I heard anything about the union and I told him no.

JUDGE FISH: Could you speak up a little?

THE WITNESS: He asked me if I heard anything about the union and I told him no.

Q. Now directing your attention to the next night, Friday, March 23, 1979, while you were performing at [224] another place called Lynn's Lounge in Chicopee, did Patterson appear there?

A. Yes, he did.

Q. What did he say on that occasion?

A. He came over to me and knelt down on the side where I was sitting and he told me that he heard Sam Santillo started the union, and called him two face, among other names, and told me that he was going to get even with him.

Q. Now directing your attention to the next day, Saturday, March 24, did you speak to Patterson at the terminal that day?

A. Yes. He let me into the garage that day and he asked me to do some work on one of the buses. I had to fix a bus window and put it back on the track. And he asked me if I signed a union card and I think I denied it.

He was telling me about the time that he had some dealings with the union and how they screwed him, something to that effect. And he went into his office—well, I went into the office and he was on the telephone. I came back out, and then he came back out later and I was still trying to fix the door.

He told me, he says, "I wasn't supposed to ask you any questions about the union."

[225] And I says, "Well, I could have told you that."

And he asked me, well, why didn't I? And then he told me not to mention anything about what we spoke of.

Q. In any of these conversations with Mr. Patterson did he get into discussing—well, in this conversation about Santillo in Chicopee, did he say anything about Santillo and a woman?

A. Yes, he did.

Q. What did he say?

A. He said that Sam called his girlfriend or something and tried to go with her or some sort—

Q. Called Patterson's girlfriend?

A. Yes.

Q. Was there anybody else present with you at the time?

A. Yes.

Q. Who was that?

A. My girl.

Q. And is your girl friendly at all with anybody involved here?

A. Yes.

Q. With Santillo's wife?

A. Yes.

CROSS-EXAMINATION

[226] Q. (by Mr. Kennedy) There has been testimony here about coffee breaks. What is the practice with regard to coffee breaks?

A. Everybody took coffee breaks.

Q. Did you take coffee breaks?

A. Yes, I did.

Q. How did you take them, what period of time?

A. In between my runs.

Q. Anybody ever tell you not to do it?

A. No.

Q. Did you hear of any rule about it?

A. No.

[230] Q. That Saturday that you referred to, were you there to fix a bus or were you there to work on your own car?

A. I was there to work on my own car and he asked me to fix a bus window.

[231] Q. Did you actually work on your own car that day?

A. Yes, I did.

Q. What was the purpose of you coming to work—was it to work on your car?

A. Yes.

Q. And indidentally he asked you to do something on the bus?

A. Yes.

[232] Q. That's fine, but my question is the frequency in which you, from your experience of keys being left on the bus, this would not be a regular practice, would it?

A. I found keys in the buses quite often.

Q. When you say quite often you are talking about two or three vehicles two or three times a week?

A. Right.

Q. Is that what you mean by quite often?

A. Yes.

Q. And that is what you mean by, it's a regular practice?

A. Yes. I have left the keys in the buses myself.

[234] Q. Relate this conversation about George Patterson's girlfriend. When did that take place?

A. It was at Lynn's Lounge.

Q. And when was that?

A. March 23.

Q. About what time of the evening was that? Was it in the evening?

A. Yes. It was about quarter after 10, 10:30, within that time period.

Q. And with regard to George Patterson's girlfriend, what was the conversation?

A. He said that Sam Santillo called his girlfriend and tried to take her out or go out with her or something of that sort. That is what he tried to get across.

Q. And did he mention that kind of matter of factly or did he seem to me maybe a bit upset about it?

A. He was upset because he said that he would get even with him.

Q. Was it your impression that George Patterson was bothered over Santillo asking out his girlfriend?

A. I don't know.

Q. Did you get the impression he didn't care whether [235] Santillo asked out his girlfriend or not?

A. I couldn't tell you.

Q. You couldn't tell me?

A. Whether he was bothered—

Q. How did he appear to you?

A. What I felt that my girlfriend was with me and—

JUDGE FISH: Excuse me, Mr. Welensky. I am really not interested in his impressions. Ask him about what he heard and what he saw.

MR. KENNEDY: Well, I wouldn't mind him asking that last question.

JUDGE FISH: You wouldn't mind but I'd rather not have testimony about his impressions. It doesn't help any.

MR. WELENSKY: I am interested in knowing how Patterson appeared to him, and let me ask it this one way.

Q. Did Patterson appear like he didn't care or did he appear that he was bothered by it?

A. I don't know if he was bothered by that or—

Q. No, I am just asking you specifically in regard to that?

A. He seemed upset but I didn't know, you know, whether it was over that or over the union bit. I couldn't tell you.

[236] LEE HOLMES

was called as a witness by and on behalf of Counsel for the General Counsel and, having been first duly sworn [237] was examined and testified as follows:

Q. Now directing your attention to January of '79, did you have a conversation with George Patterson about taking coffee breaks?

A. Yes.

Q. What was your system of taking coffee breaks?

A. I took a coffee break in the morning between my Goodwill run and my regular school run. During the conversation he asked me what the time lapse was on my tachograph, and I explained to him that I was taking a coffee break due to the time that I dropped off my Goodwill people and the pick up of the school run, the variation of time.

[238] Q. As a consequence of this conversation with him, did you change your system of taking coffee breaks?

A. No, because I explained to him they would make my school run too early.

Q. Did he have any objection at that point to it?

A. I explained to him the reason I was running my— he was complaining the main thing that I was getting my kids to school too late on my school run, that I should run my

school run earlier. But I explained to him that it wasn't because of the coffee break, because the law states that the kids are to be on the bus for one hour.

And I picked them up, the first stop at eight o'clock and I wasn't at school at that time until roughly quarter of ten, nine-thirty, quarter of ten. It was because I had too many kids, not because I was taking a coffee break.

Q. Did that resolve the matter?

A. That was the end of the conversation.

Q. And you went back to your old system?

A. Yes, whenever I had the break in there. I made sure that I picked up my first school run at eight o'clock. If I had a lapse in there then I took a coffee break.

Q. Did you have a tachograph in your vehicle?

A. Yes, for awhile.

Q. Was it turned in each week?

A. I had nothing to do with it. I turned in time cards every week.

Q. Were you paid for the time you were taking these coffee breaks?

A. As far as I know.

Q. Do you have a Chicopee run?

A. Yes, for awhile.

Q. What were you paid for the Chicopee run?

A. $3.88, I believe.

Q. Is that the same run that Mr. Santillo was doing?

A. Right.

Q. Did you know that Mr. Santillo was making $6.15 an hour for that?

A. No, not until today.

Q. Would you explain the procedure on half days?

A. I believe school got out at 11:20 or something like that, and Goodwill was at 4 o'clock. So I would have my school run done at roughly 1:30, 2:00, and I would sometimes go home or stop at a coffee shop somewhere and take a break until I had Goodwill at 4:00.

Q. You stopped at a coffee shop or you went home about when?

A. 2:30 maybe.

[240] Q. And you got to the place at 4 o'clock?

A. Yes, I made sure I was there at least at 4 o'clock.

Q. Were you on the clock for that hour and a half?

A. Yes.

CROSS-EXAMINATION

Q. Do you know for a fact that you were being paid for that hour and a half down time?

A. As far as I know. I turned in my time cards and the only difference in my time that I could account for was the difference in the time I was waiting at the Howard Street School, from the time he paid me and the time I turned in.

Q. Wasn't there a problem with your making your afternoon run and then making the Sunshine run?

A. Yes, that's why he took the—

[241] Q. He took it away from you, didn't he?

A. Yes. We discussed it.

Q. He talked to you about taking coffee breaks in the morning, didn't he, Mr. Patterson?

A. Yes, that is when I explained to him.

Q. Didn't he tell you that he wanted you to stop taking coffe breaks and get the kids to school earlier?

A. I told you, that is when I explained to him what it was, he asked me if I take my coffee break before or after my run. And I told him it wasn't because I was taking coffee breaks, it was due to the number of children that I had to pick up.

Q. Isn't it a fact that you stopped taking your coffee break at that time?

A. Not because he told me to.

Q. Not because he told you to?

A. No, it was because of the run. I still had—

Q. Because he added more people?

A. They rearranged the routes at that time.

Q. And that eliminated your coffee break during the run?

A. I didn't eliminate all coffee breaks. If you check the records, you'll find I took one.

Q. I am asking you specifically about that coffee break that you had been taking, the route was changed—

A. I didn't take them every day, no.

[242] But I did take them, yes, after that time.

Q. Please listen to the question and try and answer the question I am asking.

With regard to that specific coffee break that Mr. Patterson had talked to you about, was your run changed so that that coffee break was eliminated?

A. Not completely.

Q. You were taking a coffee break at a given time?

A. Right.

I am saying I had a coffee break between the Goodwill run and my regular school run. This is the coffee break that Mr. Patterson spoke to me about, that you are talking about. And I said the route was changed so I—not every day, I didn't take this coffee break every day—I said if it so ran that my Goodwill run a lot of times a lot of people didn't show up, so therefore I could make the run faster.

So therefore I would get to Goodwill earlier.

Q. You only took the coffee break on the days that you had time for it?

A. Right.

Q. And if you didn't have time for it, you didn't take it?

A. Right, that is what I am saying.

Q. But after Mr. Patterson spoke to you—

[243] A. I continued the same.

Q. The same way?

A. Right, becuase I explained to him it wasn't the fact that I was having the coffee break—because the reason that he was talking to me because of this break was because I was getting into the school too late on my school run. And I explained to him that it wasn't the coffee break—

Q. It was the Goodwill run that you had earlier?

A. No, it was the fact that the regular school run had too many kids on it to pick up, and a lot of times it made me get them there late. Because I couldn't take and pick up my Sunshine earlier because my first pick up there was at seven o'clock and I couldn't pick them up earlier because they didn't have their breakfast yet.

[244] Q. Did you initiate this conversation with Mr. Patterson about the coffee breaks?

A. No.

Q. Did he initiate it?

A. Yes.

Q. And he came to you—

A. And asked me about why I was taking a 10 minute break.

Q. Did he say how he knew about it?

A. Yes.

Q. How did he say he knew about it?

A. Tachometer. He noticed that I was having a 10 minute break every day, I believe at 10 minutes of 8, or in that area.

Q. He noticed that from your tachograph reading, right?

A. Right.

Q. And he came to you and talked to you about that?

A. Yes.

[245] Q. Now was there a situation where yourself and Russell vanHorn had been sitting at a school waiting for it to be let out and you were sitting there for a half hour or three-quarters of an hour per day, and Mr. Patterson spoke to you about that?

A. Well, I—

Q. I am just asking you if he spoke to you about the situation?

A. Yes.

Q. Okay. Did this discussion take place because you questioned him about why you were paid for less time than you thought you should be paid for?

A. Right.

Q. Didn't Mr. Patterson tell you that he wasn't going to pay you for sitting at a school for an unnecessary period of time?

A. Right.

Q. You worked in the terminal once a week?

A. I washed school buses.

Q. In November and December of '78?

A. Yes.

Q. and you noticed that Sam Santillo left his keys in his bus a lot, isn't that correct?

A. Right.

Q. And most of the drivers put their keys on the rack in [246] office, isn't tht correct?

A. Most of them did. As far as being directed to, I don't know.

Q. The question is did most of the drivers put their keys in the key rack in the office—

A. As far as I know, yes.

Q. Well, that is what you said in the statement to the NLRB, isn't it?

A. (No response.)

Q. Didn't you say that, "There is a key rack in the office used by most of the drivers."

A. I must have said it.

Q. You made that statement, didn't you?

A. I did.

Q. You were telling the truth when you made that statement, right?

A. I suppose so, if I said it. Like I said, that was a year ago, I don't know exactly what I said.

Q. Okay, well, do you want to change that statement?

A. No, I don't want to change it.

[247] REDIRECT EXAMINATION

Q. (by Mr. Kennedy) You testified that after this conversation with Mr. Patterson about coffee breaks you continued to take coffee breaks, is that correct?

A. Yes, when I had the opportunity.

Q. And did you have a tachometer in your vehicle?

A. Yes.

Q. Did Mr. Patterson from that date forward ever come back to you and rebuke you for coffee breaks after that?

A. No.

RECROSS-EXAMINATION

Q. (by Mr. Welensky) Do you know whether you were paid for those coffee breaks(

A. Like I said, I used to turn in time cards—

Q. No, I am just asking, do you know if you were paid for those coffee breaks?

A. I am trying to explain to you.

I said the only time I can tell the difference when [248] he—from what I used to get paid and what he went by. I know what time I turned in.

Q. The question is this, do you know, in fact, whether or not you were paid for those coffee breaks?

A. No, I can't say for sure, but I can say I know—

Q. Well, you—

JUDGE FISH: Let him answer it.

THE WITNESS: I used to turn in time cards every week. He has a copy of them—I don't know whether he still does or not but I do at home, and I know I still have my pay stubs—that the time that he paid me for and the time that I turned-in for, I could almost say was the time I sat down the Howard Street School waiting for the kids to get out of school.

Q. You could almost say?

A. Right.

[252] SHEILA KELLY

was called as a witness by and on behalf of the Respondent and, having been first duly sworn was examined and testified as follows:

JUDGE FISH: Have a seat and give your full name and address for the record, and please speak up.

THE WINTESS: Sheila Kelly, 58 Alcon Drive, Chicopee.

DIRECT EXAMINATION

Q. (by Mr. Welensky) Were you ever employed by Transportation Management Company?

A. Yes, sir.

Q. and when were you employed?

A. From January of this year to June of this year.

Q. And what was your job?

A. I was a van driver.

Q. Are you acquainted with Sam Santillo who also worked [253] for the company?

A. Yes.

Q. You live at 58 Alcon Drive?

A. Yes, sir.

Q. Does Mr. Santillo also live on Alcon Drive?

A. Yes.

Q. Did you ever have any conversations with anyone in management at the company concerning Mr. Santillo's stopping and taking breaks in the afternoon?

A. Yes, sir.

Q. With whom did you speak?

A. George Patterson.

Q. Would you relate what was said in the conversation?

A. I had a phone call from George and he asked me, he said, "Does Sam park his bus—

MR. KENNEDY: Objection. Could we fix the time?

Q. Approximately how long was this before Mr. Santillo was fired?

A. I would say at the least it had to be a week and a half.

Q. And what was this conversation?

A. He asked me if I saw Sam's bus parked out there every day, and I said, "Yes, I did."

He said, "Approximately how long is he there?"

I said, "Twenty minutes to a half an hour every day."

[254] He said, "All right, thank you. That is what I wanted to know."

Q. Was anything else said in that conversation?

A. No.

Q. As a matter of fact, had Mr. Santillo been parking the bus on Alcon Drive for 20 minutes to a half hour every day?

A. Yes.

Q. And this conversation took place on the telephone?

A. Yes.

Q. Did you ever have any conversations with Mr. Santillo that you considered threatening conversations?

A. Yes, sir.

Q. Would you relate when those conversations took place and what was said?

[256] JUDGE FISH: I have a lot of doubts on the relevancy but I will allow it.

Q. (by Mr. Welensky) Will you relate when the conversation took place and what was said?

A. I had gone to a union meeting that they had for TMC employees, and this was the day after he called me on the phone. And he said—

[259] A. He called me up the day after the union meeting and said, "I would not go to another union meeting if I were you. You are dealing with bigger people than what you dealt with before. These men are not going to put up with what you are doing," he says.

I said to him, "Is this a threat? Because if it is, I am going to go to the district attorney's office. I don't have to take this, living across the street from you."

And he said, "You take it for what it's worth."

I said, "Well, please don't call my house anymore."

Q. Has he called your house again?

A. Not since that time.

Q. Did he state what it was that you better not do anymore?

A. He accused me of going to management with what had happened at the union meeting.

[260] CROSS-EXAMINATION

Q. (by Mr. Kennedy) Had you, in fact, gone to management about what had happened?

A. I certainly did not.

Q. Hadn't you talked to Mr. Patterson about the meeting?

A. I certainly did not.

Q. Did you indicate what Miss Strobell spoke at the meeting?

A. I certainly did not.

Q. Did you recall Miss Strobell speaking at the meeting?

A. Yes, I remember that she did, yes.

Q. How were you contacted about the meeting?

A. They had union representatives standing outside the office when I was driving handing out pamphlets one morning.

Q. Did you sign a card?

A. No, I did not.

Q. How many meetings did you go to thereafter?

A. Just that one.

Q. Did you have a altercation with your boyfriend that day?

A. I certainly did.

Q. Did he physically abuse you?

A. He certainly did.

Q. And were you quite upset that day because of it?

[261] MR. WELENSKY: I am going to object.

MR. KENNEDY: Now her credibility is an issue at this point. Is she telling the truth? Is she speaking from the point of view of witness with a clear mind as to what occurred that day?

JUDGE FISH: I will allow it.

MR. WELENSKY: If you want to talk about getting far afield—

MR. KENNEDY: You opened the door, Mr. Welensky?

JUDGE FISH: Go ahead, I'll allow it.

Q. (by Mr. Kennedy) You had some difficulty with your boyfriend?

A. Not the day Sam called me, no.

Q. The day before?

A. No.

Q. When was this, approximately?

A. I'd say about a week.

Q. What happened to him?

A. He got a phone call in the morning, an anonymous phone call telling him I was dating a mechanic in the ga-

rage, which he got very upset about and he beat me up for four hours while Sam's wife watched.

Q. Did you have hospitalization for this?

A. Yes, I did.

Q. Were you emotionally upset about this, I assume, [262] pretty disturbed?

A. About the beating?

Q. Yes, about the beating.

A. I was upset about it, yes.

Q. And that upset continued for some time?

A. There were other things that were done to me, and they did upset me for quite a long time. It happened right around the time all this came out.

Q. And you were nervous about things for awhile, wouldn't you say?

A. This is hard to me to answer because I'm a nervous person anyway.

[263] Q. You observed Mr. Santillo's car in front of your bus, and how did this information get to Mr. Patterson? Did you call Mr. Patterson?

A. Mr. Patterson called me and asked me a direct question.

Q. And that was about a week and a half before Mr. Santillo's discharge?

A. At the very least a week and a half.

JUDGE FISH: Could it have been more?

THE WITNESS: It could have been. I'm not quite sure. It might have been two weeks.

JUDGE FISH: Was it in March, though?

THE WITNESS: Yes.

Q. So he called you and asked you about Mr. Santillo?

A. Yes.

Q. In any of your conversations with Mr. Patterson did the subject of unions come up?

A. No, it didn't.

[264] Q. You didn't offer any ideas about uniosn to you?

A. No.

Q. But you were able to determine that every day of the week for 20 minutes to a half an hour each day—and you are sure a half an hour?

A. Yes, I am.

Q. How would you determine this?

A. My son watchs television. Sam would pull in about 10 minutes—before Sesame Street got done and he'd leave about 5 to 10 minutes before Mr. Rogers got done.

Q. What I am talking about is, how you had time with a small child to continuously observe the comings and goings of Mr. Santillo. How did you do that?

A. I went out the door for my paper and it would be there, the bus would be there. Or I would be coming in from shopping and the bus would be there. It was always there.

Q. So you observed it every so often during the course of the day?

A. Before I started working—

Q. But did you observe its arrival and departure is what I am getting at?

A. At least three times a week.

Q. You actually saw it coming and saw it going?

A. Yes.

[265] Q. Even though you were taking care of a three year old child?

A. Yes. I have a lot of windows.

Q. How did you have occasion to see it coming and going? Did you go to the window and look?

A. I might have been sitting on the stairs with my son.

Q. So you would see the actual arrival of the vehicle?

A. Yes.

Q. And you would see it departing?

A. Yes.

Q. What were you doing, were you doing this for Mr. Patterson?

A. No, I certainly was not.

Q. Were you actually recording his coming and going for Mr. Patterson?

A. No, I was not.

Q. Did you make a call earlier that year to Mr. Patterson on this matter?

A. No, I did not.

[266] Q. Was Mr. Santillo home?

A. Yes, he was?

Q. Was his wife home?

A. No, she wasn't. She was next door at her neighbor's house watching everything.

Q. She was watching everything?

A. That is what I heard.

Q. And she didn't come to your assistance?
A. No, she certainly did not.
Q. Did that upset you at the time?
A. I didn't know at the time that she had watched.
Q. When you found out, were you pretty upset?
A. Two or three weeks later I was a little upset, yes.
Q. So you were pretty angry with Mr. Santillos wife?
A. Not angry.
Q. You ween't angry that she wouldn't come to your help?

[267] RONALD SULLOWAY

was called as a witness by and on behalf of the Respondent and, having been first duly sworn was examined and testified as follows:

Q. (by Mr. Welesky) Mr. Sulloway, are you employed by Transportation Management Company?
A. Yes, I am.
Q. And how long have been employed there?
A. Almost two years now.
Q. And what is your position with the company?
A. Supervisor.
[268] Q. Are you acquainted with a former employee named Sam Santillo?
A. Yes, I am.
Q. And have you ever had any conversations with Mr. Santillo concerning leaving keys in his bus?
A. Yes, I have, twice.
Q. And would you relate when these conversations took place and what was paid?
A. The first time was about three weeks before he got fired and the last time was the day he got fired.
Q. And the situation three weeks before he got fired, did the conversation take place at the garage?
A. Yes, it did.
Q. And what was said?
A. I told him that we did not leave the keys in the buses, and that they are to be hung up by my desk.
Q. Is there a rack for the keys near the desk?
A. At the time there was not a rack. They would be brought in to me.
Q. Did Mr. Santillo respond?

A. Yes, he did. He said that he did not have to listen to him, the bosses' ass wiper and he didn't have a listen to me.

Q. Anything else said in that conversation? This is the one three weeks before.

[269] A. No, there was nothing else said. I let it go at that.

Q. You said you had another conversation with Mr. Santillo about the keys the week before he was fired?

A. Right. No—that was the day he was fired that came up.

Q. The day he was fired?

A. The day he was fired.

Q. Did you have a conversation with him the week before he was fired?

A. Not the week before, no.

Q. The day he was fired did you have a conversation?

A. Yes.

Q. What was that conversation?

A. It was about the keys.

Q. Was that at the garage also?

A. Right.

Q. And what was said?

A. He said he did not have to listen to me.

JUDGE FISH: What did you say first?

THE WITNESS: I told him, I said, "Sam, I've already warned you once about the keys," and I said, "This time I'll have to take and write you up."

And he said that he did not have to listen to me, and that is when I went to Mr. Patterson and I told him.

[270] Q. Did Mr. Santillo say anything else to you at that time?

A. No, he just said he didn't have to listen to me.

Q. The time that Mr. Santillo was fired, do you know whether or not he was for or against the union?

A. I don't know nothing about the union.

CROSS-EXAMINATION

MR. KENNEDY: Can we enter a stipulation that Mr. Sulloway is a supervisor?

MR. WELENSKY: Yes.

JUDGE FISH: The stipulation is received.

Q. You said three weeks before Mr. Santillo was discharged you spoke with him about keys not being turned over to you?

A. We told him they were not supposed to be left in the bus because I can't keep an eye on all the vehicles at the same time, you know, from being inside there.

[271] Q. Are you sure there was no board at that time to hang them up on?

A. The board wasn't up there then. We had hooks up there but no boards.

Q. What would you do with the keys?

A. The keys were on the hooks.

Q. Have you had occasion to speak to anyone else about leaving their keys in their vehicle?

A. Yes, I spoke to a few other guys about it.

Q. Do any particular individuals come to mind?

A. I spoke to Mr. Johnny Walker. I spoke to Mr. Thomas Allery and two or three others. And I have had no problems with them since.

Q. You spoke to each one of them once?

A. Just one time, sir. I told them the keys are supposed to be left in here. There is no way that we can watch the buses and do our work at the same time.

Q. The day he was fired you spoke to Mr. Santillo about the keys in the bus?

A. Yes, sir.

Q. What day did he leave the keys in the bus—or did he leave the keys in the bus that day or were you just reminding him not to do it?

A. No, sir, the keys were not on the board where they were supposed to be, and I found them in his bus.

[272] Q. In his bus?

A. Yes, sir.

Q. What time was this?

A. I'd say it was about 10:30, 11:00, somewhere in there.

Q. And you spoke to him at the garage at that time?

A. When he came back in for his afternoon run.

Q. Did you observe leafletting by the Teamsters Union that day?

A. No, there wasn't.

Q. The day that you spoke to him was the day he was fired, and you said around 10:30, and you observed no Teamster leafletting when you came to work that day?

A. I don't recall really, sir.

Q. Did you go to a Union meeting that night?

A. I didn't go to no meetings.

Q. Which way do you come to work, through the main gate?

A. Through the front door. I unlock the door in the morning.

Q. And you are absolutely certain that the day you are talking about is the very day that Mr. Santillo was fired?

A. That is when I talked to him about the keys the last time.

Q. Do you know when he was fired that day?

[273] A. When he came in for his afternoon run.

Q. If I told you that Mr. Santillo didn't come to work for his afternoon run that day—

A. Mr. Patterson was the one who fired him. I don't know if he called him up or if he came or when he came in.

Q. You don't know whether he came in for his afternoon run or not?

A. He came in there. He called and talked to Mr. Patterson, so that's when I figured is when he got fired.

JUDGE FISH: When you had the first conversation you had with Mr. Santillo, was it about three weeks before his discharge?

THE WITNESS: Yes.

JUDGE FISH: You said you let it go. What do you mean, you let it go?

THE WITNESS: With a warning not to leave them on the bus anymore.

JUDGE FISH: Did you tell Mr. Patterson about the incident?

THE WITNESS: Yes, I did.

JUDGE FISH: What did you tell him?

THE WITNESS: I told him, I said, "I told Mr. Santillo not to leave the keys in the bus anymore." And he says, "Okay, you told him. We'll let it go. If it [274] happens again we'll write him up." And that is what I was going to do. We have papers that we write up on them and we put them in their folders.

JUDGE FISH: You have papers that you write up?

THE WITNESS: Yes, sir.

JUDGE FISH: When do you do that?

THE WITNESS: When I tell them, and they have to sign them.

JUDGE FISH: I mean in what situations do you write up?

THE WITNESS: Well, we have these spare buses and if they fail to gas them and stuff like that when they get done using them, we write it up and put it in there, stuff that they refused to do.

JUDGE FISH: Like a written warning?

THE WITNESS: Right, written warnings. After three of them it's cause for dismissal.

JUDGE FISH: And Mr. Santillo never received any of those written warnings, did he?

THE WITNESS: No, he didn't.

[279] MR. WELENSKY: Just a very brief oral argument.

There is no question Mr. Patterson knew that Mr. Santillo favored the union prior to Mr. Santillo's discharge. There is no question that Mr. Patterson knew of many employees' sympathy about the union for or against prior to and at approximately the same time of [280] Mr. Santillo's discharge.

The fact of the matter remains that Mr. Santillo was taking coffee breaks in the morning, whether he believes he was entitled to them or not is not the issue. The fact of the matter is that he was taking them and he was warned about them well in advance of his union activities.

Secondly, Mr. Santillo admittedly was stopping at his home for 10 to 15, possibly 20 minutes by his own admission. There has been testimony that it has been up to a half hour. This was done virtually every afternoon. This was on his way back to the garage after making his last run of the day.

He could have driven directly to the garage, 10 minute drive, used the rest room facilities at the garage. Instead he chose to stop at his home on the way back after his last run.

Word of this was received by the Company prior to any union activities by Mr. Santillo, which admittedly didn't start until the week of March 19. The new tachograph was put into his bus the week prior to any union activities by Mr. Santillo.

It was completely unrelated to any union activities by the timing alone. The first full week when they had tachograph readings it showed that, in fact, Mr. Santillo was making

these stops, was taking the stop for the coffee [281] break in the morning. More importantly, his taking that break every afternoon. And these tachs and graphs are read and they reveal the break in the morning, the break in the afternoon.

Mr. Santillo was fired. Mr. Santillo had been paid for six and a half hours per day since December of 78. That is an extra half hour per day over what his actual time according to the tach was.

He knew that Mr. Patterson was very concerned about time. They had had a discussion the year before about Mr. Santillo's stopping for breaks. Mr. Patterson was concerned about that.

From other witnesses Mr. Patterson was concerned about other witnesses stopping and taking coffee breaks. He talked to Mr. Holmes about it. He talked to other employees about it. It was something that he was concerned about, employees stopping and taking breaks when the time could be better used as working time.

Mr. Santillo denied taking the breaks. He was getting paid for an extra two and a half hours a week week and in week out for at least the last few weeks, that's $15 a week paid for non-working time, and this is the reason Mr. Santillo was fired.

WE 3-25-79 TMC

	Mon	Tue	Wed	Thurs	Fri	
McClurens	5	4.83	7	5	5	2683 ✓ 1.25 ✓ Charter
Dudley	4	4	4	4	4	2009 ✓
Allercy	5.33	5.66	5	5.66	5.66	2731 ✓
Feathimcoat	4.83	5.33	6.5	5.33	5.33	2732 ✓ .25 ✓ No Charter
Walker	5	5.07	4.83	5	5	2490 ✓
Smith	2	X			X	2 ✓
Holms	4.66	4.83	5	4.83	5.66	2490 ✓
Scaffide	6.17	6	6	6.25	5.33	2.66 Term.
Johnson	3.75	4	4	4	3.75	1950 ✓
Hansen	4	4	4	4.33	4	2033 ✓
Dwight	2.33	4	4	4.25	4.5	1908 ✓
Stenard	4	4.5	4.5	4.25	4.33	2158 ✓
Keeley	4.33	5	5.25	4.66	4.83	2407 ✓
Hogan	6.25	6	6.17	6	6.25	3067 ✓
Cook	3.5	3.75	5	3.75	4	2000 ✓
Pahlow	Time Card					
Stodell	Time Card					
Hess	Time Card					
VanHorn	Time Card					
Joseph Baer	Time Card					

NATIONAL LABOR RELATIONS BOARD
Docket No. 1-CA OFFICIAL EXHIBIT NO. R-1
Disposition: Identified ✓ Received ✓ Rejected
In the matter of
Date 10/4 Witness Reporter
No. Pages

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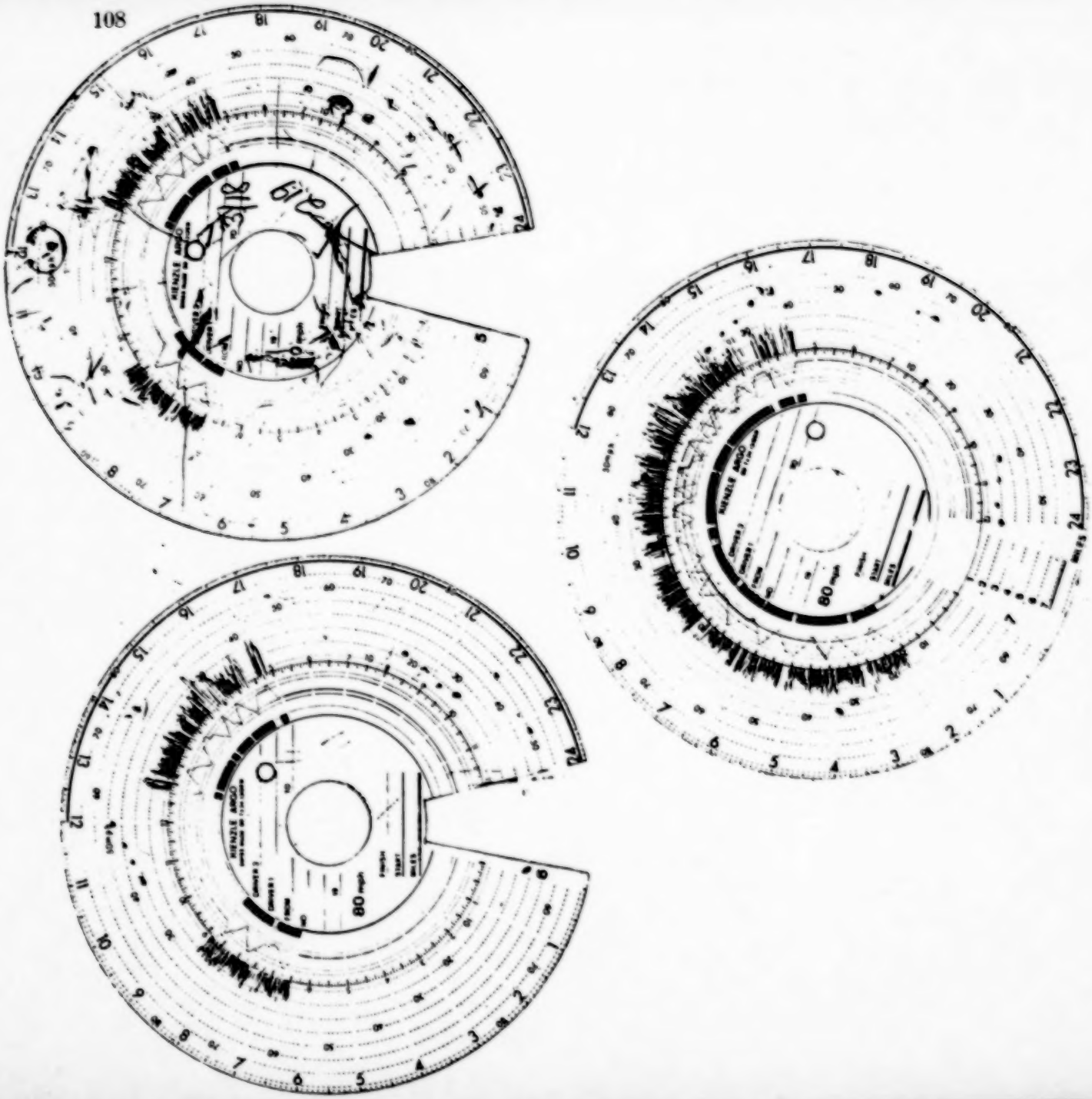

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

FIRST REGION

In the Matter of

TRANSPORTATION MANAGEMENT CORPORATION

AND

GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY AND HIGHWAY CONSTRUCTION EMPLOYEES LOCAL UNION 404, a/w THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

CASE NO. 1-CA-15,846

RESPONDENT's EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent takes exception to the rulings, findings, conclusions and recommendations contained in the Administrative Law Judge's Decision, as follows:

1. The finding under Findings of Fact, Section III.A., recited on page 2 that Santillo began his employment at $2.30 per hour in 1976 and received raises to $6.15 per hour in 1979.

The grounds for the exception are that the finding as stated indicates that these raises were merit increases. The finding omits stating that Santillo's testimony and a stipulation between the parties reveals the raises were not merit increases but, rather, were given across the board to all employees regardless of the employee's length of employment or performance (Tr. 5, 32).

2. The finding under Findings of Fact, Section III.A., recited on page 2 that Santillo and another employee went to the offices of the Union on March 19, 1979.

The grounds for the exception are that the finding indicates that Santillo was the first to initiate union activity at Respondent's establishment. The finding omits stating that according to the testimony of both Santillo and Patterson,

an employee named David Wands initiated union organizational activity at Respondent's establishment prior to any union activity by Santillo (Tr. 33, 152, 153). Wands is still employed by Respondent (Tr. 153).

3. The finding under Findings of Fact, Section III.A., recited on page 3 that Paterson approached employee Baer on March 22, 1979 at the Train Stop where Baer was employed evenings as a musician, that Paterson initiated a conversation regarding the union, and that Paterson had never previously appeared at any place where Baer worked in the evening.

The grounds for the exception are that the finding indicates that Paterson went there specifically for the purpose of discussing the union with Baer. The finding fails to include Baer's testimony that Paterson told him he was meeting some other people there that evening (Tr. 230).

4. The finding under Findings of Fact, Section III.A., recited on page 3 that on March 23, 1979, Paterson spoke with Baer at Lynn's Lounge and that Paterson stated that he heard Santillo started the Union, called Santillo two-faced, said he would get even with Santillo, complained about Santillo trying to date his girlfriend and again stated he would get even with Santillo.

The grounds for the exception are that the finding fails to mention that only under cross-examination does Baer first reveal that Paterson spoke of "getting even" with Santillo because of Santillo trying to date his (Paterson's) girlfriend and that Paterson was upset over this (Tr. 234); Baer's direct testimony only connected "getting even" with Santillo's union activities (Tr. 224). There is nothing in the transcript to warrant a finding that Paterson made the statement regarding "getting even" more than one time. Baer himself was not sure if Paterson's reference to "getting even" applied to Santillo trying to date Paterson's girlfriend or to Santillo's union activities (Tr. 235).

5. The finding under Findings of Fact, Section III.A., recited on page 5 that discredits Paterson's testimony that he learned of employee union activities mostly through unsolicited statements of employees.

The grounds for the exception are that Paterson's testimony is completely credible and supported by the evidence in light of his admitted inquiry concerning union activities to certain employees, his admitted recollection of one specific such inquiry to employee Stebbins, and his frequent

and everyday conversations with employees generally (Tr. 84, 85, 86, 166, 167, 168).

6. The finding under Findings of Fact, Section III.A., recited on page 5 that discredits Paterson's testimony concerning Santillo's role in union organizational activities.

The grounds for the exception are that the finding ignores and does not resolve Paterson's testimony that he believed David Wands was the union ringleader (who Santillo acknowledges began the union activity) (Tr. 33, 152, 153) and that the evidence fails to show that Paterson ever had reason to believe that Santillo, rather than Wands, was the union ringleader. The Decision's statement that Paterson's testimony in this regard is "highly dubious and unworthy of credence" is a broad, conclusory and unsupported statement.

7. The findings under Findings of Fact, Section III.A., recited on pages 6 and 7 that indicates Paterson testified that 22 employees approached him and, unsolicited, told about the union activities of others.

The grounds for the exception are that the finding totally mischaracterizes Paterson's testimony which was not that 22 employees had approached him and provided such information but, rather, that he was able to recollect the names of approximately 22 employees in favor of the union through conversations he had with employees some 7 or 8 months earlier and that he was not able to recall which employees had told him which specific names (Tr. 152-157).

8. The finding under Findings of Fact, Section III.A., recited on page 6 that Paterson conducted an extensive campaign of interrogating a number of employees during the week prior to Santillo's discharge on March 26, 1979.

The grounds for the exception are that the finding regarding the 22 employees is clearly erroneous. Additionally, Paterson's statements that he only asked a few employees about union activities and the testimony of the employees with whom Paterson discussed the Union do not support a finding of an extensive campaign of interrogation. The finding makes a quantum leap from a few instances to a sweeping generalization and, without good reason, dismisses the totally credible notion that the information mostly [-5-] came to Paterson through his frequent, casual conversations with employees.

9. The finding under Findings of Fact, Section III.A., recited on page 6 that although it can be surmised that

Paterson observed or was made aware of Santillo's contact with union officials while they were leafletting, that it is conceivable that Patterson did not happen to look out at that time and that the record is therefore insufficient to establish awareness of this activity on Santillo's part.

The grounds for the exception are that this matter should have been dismissed with a definitive statement as to the total lack of evidence to support any such supposition and that the only evidence, and credible evidence, was that paterson did not know of or observe such activity on Santillo's part. The finding fails to mention that Paterson denied seeing or knowing of Santillo's activity in this regard, the place where the leafletting occurred is not observable from either Paterson's office or from the garage, that Paterson went outside the garage and looked briefly only after being given a leaflet by Van Horn and then only observed the presence of the two union officials without any leafletting taking place at the time (Tr. 158-160).

10. The finding under Findings of Fact, Section III.A., recited on page 6 that Santillo was called into Paterson's office later on in the day (March 26, 1979).

The grounds for the exception are that the finding fails to state that Santillo was called in at that time because Paterson had read the tacograph discs with the meter that morning and [-6-] thereby established conclusively that Santillo had been receiving pay for time not worked and established the exact amount of time involved (Tr. 174-176). Omitting this information suggests that there was no particular reason for Santillo being called in at that time.

11. The finding under Findings of Fact, Section III.A., recited on pages 6 and 7 that Santillo requested the reasons for his discharge in writing and that Paterson, after discussing the matter with Zimmerman, refused to give the reasons in writing.

The grounds for the exception are that the finding indicates that Respondent refused a seemingly reasonable request by Santillo. The finding omits stating that Respondent has never provided employees with a written statement of reasons for termination and that Respondent's refusal was therefore in keeping with its usual practice rather than being an exception thereto (Tr. 96, 150, 180).

12. The finding under Findings of Fact, Section III.A., recited on page 7, footnote 7, that Paterson brought up the subject of the Union at the time of Santillo's discharge by

stating that the discharge had nothing to do with the Union and that Santillo did not bring up the subject of the Union.

The grounds for the exception are that the finding credits Santillo's account over Paterson's based on unspecified "demeanor considerations" and on Van Horn's comment when Santillo was leaving that the Union would make a "mountain" out of Santillo. Van Horn's comment is equally consistent with Santillo raising the subject of the Union as with Paterson raising the subject and is therefore not a valid basis for a credibility resolution. The finding over-[-7-] looks facts that are consistent with, if not persuasive of, Santillo raising the subject which are: Santillo admittedly contacted the Union before going to see Paterson when Paterson called him to come in because Santillo though he might be fired; Santillo believing that he was fired for union activities, and; Santillo testifying it was possible that it was he that brought up the subject of the Union (Tr. 43).

13. The finding under Findings of Fact, Section III.A., recited on page 7 that Santillo's stealing time relates to taking a coffee break in the morning and stopping at his house before reporting back to the garage.

The grounds for the exception are that the finding fails to state that Santillo also took a coffee break every afternoon which Santillo admitted (Tr. 22, 23, 24).

14. The finding under Findings of Fact, Section III.A., recited on page 7 that Santillo stopped at his house before reporting to the garage and punching out.

The grounds for the exception are that the finding indicates the drivers are on a time clock. The finding fails to state that there is no time clock and drivers are paid strictly according to the time worked as shown on their tachograph discs (Tr. 132, 133) except for Santillo who was paid according to the time he claimed he was working (and except for those employees working less than the minimum guaranteed 2 hours per run) (tr. 136-138).

15. The finding under Findings of Fact, Section III.A., recited on page 7 that Paterson considered Santillo stealing time because Santillo was "on the clock" and being paid for the time [-8-] he was taking coffee breaks and stopping at his house.

The grounds for the exception are that the finding as stated lessens and downplays the enormity of Santillo's offense by failing to set forth that Santillo was being paid for an extra 1/2 hour per day or 2 1/2 hours per week at the

rate of $6.15 per hour for time not actually worked and that this practice continued over a period of at least several months (Tr. 136-138, 147, 148).

16. The finding under Findings of Fact, Section III.A., recited on page 7 that there is much dispute with respect to Company policy and warnings concerning the areas of coffee breaks and stopping at home.

The grounds for the exception are that the finding suggests uncertainty with regard to employees stopping at home when the only evidence is that the Respondent does not approve or allow such practice and the finding suggests coffee breaks are being taken unknown to the Respondent are permissible when the evidence reveals that Respondent has rearranged routes, added children to routes, docked pay or take some other action when unpermitted coffee breaks are revealed (Tr. 183-188, 200).

17. The finding under Findings of Fact, Section III.A., recited on page 8 that employees Danko, West and Baer were unaware of any company rule prohibiting coffee breaks, that they had taken coffee breaks as a matter of course, had seen other employees taking coffee breaks and had never been spoken to or warned about it by Respondent.

The grounds for the exception are that the finding fails to state certain essential facts which make this an unwarranted finding [-9-] and reveal that the situations of these three employees are not comparable to Santillo's situation. Danko's hours fall within the minimum guaranteed two hours and therefore any break time would not be additionally compensated (Tr. 71). West drove a bus at one time but none of the buses had tacographs at that time, he later drove a station wagon which are not equipped with tacographs, and, in any event, did not stop for coffee for more than two or three minutes (Tr. 216, 219). Baer performed mechanical work and drove a wheelchair van which are also not equipped with tacographs (Tr. 139). The testimony of these employees concerning seeing other persons taking coffee breaks has no relevance without evidence of the type of vehicle, the nature of the work or run performed by those drivers and whether the working time of those drivers fell within the minimum guaranteed hours.

18. The finding under Findings of Fact, Section III.A., recited on page 8 that Respondent's driver information

booklet makes no reference to any company rules regarding coffee breaks.

The grounds for the exception are that the finding indicates that the booklet is applicable to bus drivers when, in fact, the booklet was prepared for station wagon drivers (Tr. 126); there is no evidence that the terms and conditions of employment of bus drivers and station wagon drivers are the same or even similar.

19. The finding under Findings of Facts, Section III.A., recited on page 8 that employee Holmes had a problem on his route was due to the number of children on the route and not due to his stopping for coffee breaks; that Paterson spoke to him about this, the route was rearranged and Holmes was able to continue [-10-] taking coffee breaks and was paid for the time.

The grounds for the exception are that the finding is misleading by failing to state that Holmes' route was changed to eliminate his coffee break time, that Respondent had no knowledge of his continued coffee breaks, and that Holmes admitted he really does not know whether he was paid for this coffee break time (Tr. 239, 241, 242, 248). The finding also fails to take note of the fact that Respondent's concern with employees stopping to take coffee breaks was not limited to Santillo but was directed to Holmes back in January, 1979 (Tr. 237).

20. The finding under Findings of Fact, Section III.A., recited on page 8 that Paterson's testimony concerning coffee breaks was confusing and contradictory.

The grounds for the exception are that the finding is inaccurate and misleading by failing to recognize that Paterson testified there is no hard and fast policy regarding coffee breaks but is dependent upon each individual situation (Tr. 183-188); the finding would cast the lack of a uniform and rigid rule to every situation as confusing and contradictory.

21. Exception is taken to the findings under Findings of Fact, Section III.A., concerning Santillo's coffee breaks by the failure to make findings as to the following:

a. Santillo's affidavit to the NLRB that he never took coffee breaks other than the one time the Springfield School Department became involved (Tr. 40, 41).

b. Santillo admittedly denying to Paterson he was taking coffee breaks when, in fact, he was doing so and thereby lied to Paterson (Tr. 42).

c. Santillo's affidavit to the NLRB that when Paterson spoke to him about stopping for coffee breaks, Paterson told him that he had warned him before about taking coffee breaks (Tr. 42).

d. Santillo's bus did not have an operating tacograph during the 1978/1979 school year until two weeks before Santillo's discharge, therefore Respondent would not have knowledge of Santillo taking coffee breaks during this time and thereby be able to take corrective or disciplinary action (Tr. 131, 200).

e. Santillo's continued taking of coffee breaks was only learned because Respondent installed a new tacograph to determine whether Santillo was stopping at his house every afternoon (Tr. 132, 200).

22. The finding under Findings of Fact, Section III.A., recited on page 9 that Paterson asked Santillo if he was stopping at his house before returning to the garage; this finding follows a finding that Paterson confirmed Santillo's practice in this regard with employees Kelly and Sotorpoulis.

The grounds for the exception are that the finding as stated indicates that Paterson questioned Santillo about

this practice only one time which was after confirmation by the two employees. The finding omits stating that this was the second time Paterson questioned Santillo about stopping at home, the first occasion being after Paterson received the anonymous telephone call and before confirmation with Kelly and Sotoropoulis (Tr. 82, 83).

[-12-] 23. Exception is taken to the findings under Findings of Fact, Section III.A., recited on page 9 concerning Santillo stopping at his home before returning to the garage, in the following respects:

a. Failure to make a finding that Santillo admitted he lied to Paterson concerning this practice (Tr. 82, 83, 130).

b. Failure to make a finding that Santillo stopping at his home and his denial of this practice was the reason Respondent installed a new tacograph in Santillo's bus (Tr. 83, 132).

c. Failure to make a finding that when Respondent read the tacograph disc from Santillo's bus it was revealed that not only was Santillo stopping at home but that he was also taking coffee breaks in both the mornings and afternoons (Tr. 90, 200).

d. Failure to make a finding that it was only a 15 or 20 minute drive from Santillo's home to the garage and that there are restroom facilities at the garage (Tr. 45).

e. Failure to make a finding relating gassing up time to the minimum guaranteed hours per day (Tr. 71) and thus Santillo could not reasonably justify in his mind taking unauthorized breaks for which he was being paid.

f. Failure to make a finding that with one exception, every bus other than Santillo's had a properly operating tacograph, that bus drivers were paid according to the work time shown on the tacographs (Tr. 131, 132) and that this was the closest control Respondent could exercise over the time of the bus drivers when they are on the road.

[-13-] 24. The finding under Findings of Fact, Section III.A., recited on page 9 that Patterson failed to warn Santillo concerning Santillo's practice of stopping at his home.

The grounds for the exception are that the finding implies an obligation on the part of Paterson to warn Santillo and the finding ignores the fact that Paterson had twice questioned Santillo about this practice and on both occasions Santillo denied he did this (Tr. 82, 83, 194, 195, 196).

25. The findings under Findings of Fact, Section III.A., recited on pages 10 and 11 that Sulloway denied warning Santillo on the Thursday or Friday before his discharge concerning Santillo leaving his keys in the bus, that Sulloway warned Santillo in this regard three weeks prior to his discharge and again on the day of his discharge, and that Respondent's counsel made an extensive attempt to lead Sulloway into corroborating Paterson's testimony that Sulloway had warned Santillo the Thursday or Friday before his discharge.

The grounds for the exception are that: the record clearly shows there was no "extensive attempt" by Respondent's counsel to lead Sulloway into corroborating Paterson on this point (Tr. 269); the findings fail to comment on Sulloway's demeanor as that of an obviously confused but honest witness; the findings fail to note that Sulloway was obviously confused as to the day he last warned Santillo about the keys because Sulloway testified he warned Santillo when Santillo came in to do his afternoon run (Tr. 272, 273) (Santillo did not do his afternoon run on the day of his discharge but was fired much earlier in the day) and because Sulloway testified that when he told Paterson about the matter Paterson told him to speak with Santillo about it (Tr. 275, 276) (which is inconsistent with the fact that Paterson had determined to fire Santillo at the time Santillo was still out on his morning run); the findings fail to note that Sulloway testified that the last time he warned Santillo about the keys might have occurred during the week prior to Santillo's discharge (Tr. 278); the findings make no attempt to resolve the conflict between Paterson and Sulloway regarding the last warning to Santillo about leaving the keys in his bus and conclude that no such warnings were ever given to Santillo (Tr. 115, 116, 268, 269).

26. The finding under Findings of Fact, Section III.A., recited on page 10, footnote 8, and page 11, footnote 9, that Sulloway testified concerning a system of written warnings to employees and that Paterson denied such a system existed.

The grounds for the exception are that no attempt is made to resolve this conflict in testimony (Tr. 108, 274), that no mention is made of the total lack of evidence of any written warning system, that no employee testified concerning such a system or that any of them ever received a written warning, and that testimony which concerned infractions by employees which became known to the Respondent, including one as a serious as Santillo driving his bus while drinking coffee and which was brought to the Respondent's attention by an official of the school department, resulted in only verbal warnings but never written warnings (Tr. 40, 122, 123, 129).

27. The findings under Findings of Fact, Section III.A., recited on page 11 that Santillo only left his keys in his bus between runs but never after completing his runs, that Santillo has frequently seen other employees leave keys in buses, and that Santillo's testimony is substantially corroborated by Danko who left her keys in her bus from time to time without being warned.

The grounds for the exception are that the findings omit stating that Danko kept her bus at home rather than at the garage as did Santillo and that Danko only brought her bus to the garage occasionally for servicing (Tr. 72, 73). The findings fail to mention Baer's testimony that in the course of his mechanic duties at the garage he would normally find keys left only in 2 or 3 vehicles 2 or 3 times per week and they were very infrequently the same ones (Tr. 231). The findings also fail to mention Holmes' testimony that in the course of his washing buses at the garage he noticed that Santillo left his keys in his bus a lot but that most of the drivers put their keys on the rack in the office (Tr. 245, 246).

28. The finding under Findings of Fact, Section III.A., recited on page 11 that Santillo was never warned about leaving the keys in his bus.

The grounds for the exception are that the testimony cited in support of this finding is misstated and the finding is not otherwise supported or warranted (Tr. 115, 116, 268, 269).

29. The finding under Findings of Fact, Section III.A., recited on page 11 that a new tacograph was installed in Santillo's bus on March 12, 1979, and that the tacograh measured the amount of time Santillo's bus was in operation and when it was stopped.

The grounds for the exception are that the finding omits stating that a tacograph also measures the amount of time a bus is [-16-] stopped as well as the time of day when the stops occur and therefore reveals where the driver is on his route when stops are made and the length of those stops (Tr. 127, 203).

30. The finding under Findings of Fact, Section III.A., recited on page 11, footnote 10, that the installation of tacographs on buses is not an unusual procedure and most buses contained such an instrument.

The grounds for the exception are that the finding omits stating that only one other bus besides Santillo's did not have an operating tacograph since September of that school year even though spare tacographs were available (Tr. 131, 139), the finding omits stating that the specific reason for installing a new tacograph in Santillo's bus on March 12, 1979 was to determine whether Santillo was stopping at his home in the afternoon which he had denied doing (Tr. 82, 83, 131, 132, 194–196), the finding omits stating that the installation of the new tacograph on March 12, 1979, preceded the date of Santillo's first union activities on March 19, 1979 (Tr. 31, 32), and the finding fails to note that the reports of Santillo stopping at his home every day and his denials thereof was a matter of sufficient concern to Respondent to warrant installing a new tacograph in Santillo's bus (Tr. 132).

31. The finding under Findings of Fact, Section III.A., recited on page 12 that the first week's reading of the tacograph discs showed two days when Santillo was taking breaks and stopping at home and yet Paterson failed to take any action against Santillo at that time.

The grounds for the exception are that the finding fails to state that there are seven discs in a complete set, one to record each day of a week (Tr. 95) and that a new tacograph comes with three test discs, the first two of which record the first two days of the week and the third of which records all the remaining days of the week on the same disc, one on top of the other so that each day cannot be separately read (Tr. 94, 95, 144, 145). The finding fails to state that the test discs were not properly installed (Tr. 144), and the finding fails to state that Paterson was waiting for a full week's discs, properly installed, in order to completely and accurately determine the situation regarding Santillo's stops (Tr. 94, 95, 132, 133).

32. The finding under Findings of Fact, Section III.A., recited on page 12 that Paterson's initial determination was that he was going to confront Santillo with his denials and the readings from the tacograph.

The grounds for the exception are that the finding omits stating that the new tacograph was installed in Santillo's bus only to determine whether Santillo was stopping at home, and before having the readings, Paterson did not know that Santillo was taking twice daily coffee breaks; therefore as to the original intention for the installation of a new tacograph, a confrontation was the understandable approach.

33. The finding under Findings of Fact, Section III.A., recited on page 12 that Paterson reviewed the discs from Santillo's bus on Friday, March 23, 1979.

The grounds for the exception are that the finding fails to state that Paterson only noticed gaps on the discs on Friday, March 23, 1979, and did not read the discs with a meter until Monday morning, March 26, 1979, when the amount of time in the gaps (Santillo's stops) and the time of day the stops were made was accurately determined; at that time Paterson made the decicision to terminate Santillo (Tr. 173, 175, 176).

34. The finding under Findings of Fact, Section III.A., recited on page 12 that Paterson read all the tacograph discs, including Santillo's, on Monday, March 26, 1979 as part of Paterson's regular routine.

The grounds for the exception are that the finding fails to state that every Monday morning Paterson reads the tacograph discs of all the buses with a meter to prepare the payroll sheet for the previous week for submission to Respondent's headquarters in Medford and that it takes Paterson approximately 15 minutes to read the discs from each bus (Tr. 132, 133, 137, 172, 175).

35. The finding under Findings of Fact, Section III.B., recited on pages 12 and 13 that Paterson told Baer he heard Santillo started the Union, that Santillo was two-faced and that he was going to get even with Santillo and that these statements constitute violations of Section 8(a)(1) of the Act.

The grounds for the exception are that Paterson's alleged statement that he heard Santillo started the Union is not a statement consistent with creating an impression of surveillance but is more consistent with the idea that someone told

this to Paterson. Paterson's alleged statement that Santillo was two-faced and that he would get even with Santillo, as has already been shown, was just as likely to have referred to Santillo trying to date Paterson's [-19-] girlfriend as to Santillo's involvement with the Union; the words themselves would appear to relate more to the girlfriend situation. Even the witness (Baer) testifying to this statement did not know whether it applied to Santillo's union activities or to Paterson being upset with Santillo trying to date his girlfriend (Tr. 234, 235). The conclusion is therefore based on speculation rather than proven facts.

36. The finding under Findings of Fact, Section III.B., recited on page 14 that Paterson coercively interrogated employees in violation of Section 8(a)(1) of the Act.

The grounds for the exception are that the record does not support a conclusion that Paterson coercively interrogated employees. Paterson admittedly asked a few employees about the Union (Tr. 84, 86) but an examination of the statements alleged to have been made by Paterson cannot reasonably be construed as coercive. Paterson's alleged statements to Baer asking if he had heard anything about the Union and stating that he heard Santillo started the Union (Tr. 223, 224), Paterson's alleged statement to West asking what was with Sam and the Union (Tr. 214), and even Paterson's alleged statements to Santillo asking Santillo to be sure to give an accurate portrayal of wages, and that he, Paterson, was going to pretend to be mad at him (Tr. 12, 13) cannot be construed as not have they been shown to have a coercive effect upon the employees.

37. The finding under Findings of Fact, Section III.B., recited on page 15 that anti-union animus has clearly been established.

The grounds for the exception are that the record does not [-20-] support this conclusion. No anti-union animus on behalf of Paterson or Respondent has been shown; the most that has been shown is that Paterson individually was unhappy with Santillo individually because of Santillo's claiming time he was not working, because Santillo lied to him, because Santillo tried to date Paterson's girlfriend and because Paterson took it personally that his friend Santillo had any involvement with the Union.

38. The finding under Findings of Fact, Section III.B., recited on page 15 that Santillo's leaving keys in his bus

was a pretextual reason for discharge and that leaving keys in buses was a common practice at Respondent's garage.

The grounds for the exception are that Respondent never claimed Santillo would have been fired solely for leaving keys in his bus. Respondent's reason for discharging Santillo was that he had been claiming and paid for time not actually worked and that he lied about it to Paterson. It so happened that Santillo had also been warned about leaving keys in his bus a couple of times within the few weeks preceding his discharge, that Santillo left his keys in his bus again after his morning run on the day of his discharge and this matter was brought up by Paterson when he discharged Santillo (Tr. 115-117, 151, 152).

The record does not support the conclusion that leaving keys in buses was a common practice. On the contrary, the evidence previously cited, including the testimony of Baer and Holmes, reveals it was not a common practice but that Santillo did it with some frequency (Tr. 231, 245, 246). As previously stated, the reliance on Danko's testimony is misplaced because Danko kept her bus at [-21-] home rather than at Respondent's garage (Tr. 72, 73).

39. The finding under Findings of Fact, Section III.B., recited on page 15 that the record reveals serious inconsistencies between the testimony of Paterson and Sulloway on the subject of leaving keys in buses.

The grounds for the exception are that the only inconsistency shown between Paterson and Sulloway on the subject is the date that Santillo ws last warned about this practice. As related previously, Sulloway was obviously in error as to the date of this last warning and testified that it could have occurred the week prior to Santillo's discharge rather than on the day of Santillo's discharge. The inconsistencies in testimony concerning leaving keys in buses has been shown to be more frequent and glaring among General Counsel's witnesses.

40. The finding under Findings of Fact, Section III.B., recited on page 15 that taking of coffee breaks by employees was normal practice.

The grounds for the exception are tht the finding fails to recognize that the situation with Santillo's bus was not the usual situation because his bus did not have a working tacograph and Respondent therefore had no way of knowing Santillo was taking morning and afternoon coffee breaks of 15 minutes each; that when questioned by

Paterson about taking breaks, Santillo denied he did so and told Paterson his bus was always rolling when it was out of the garage (Tr. 82, 83, 130, 131). The finding also fails to recognize that because Respondent did not have knowledge of Santillo taking twice daily coffee breaks, Respondent was foreclosed from [-22-] the option of rearranging Santillo's route, adding children to his route, or docking his pay for the time (Tr. 183-188, 200).

41. The finding under Findings of Fact, Section III.B., recited on page 15 that Respondent tolerated employees taking coffee breaks without taking any action unless the breaks interfered with the driver's route being properly performed and that no drivers were discharged or disciplined for taking coffee breaks.

The grounds for the exception are that the finding is inconsistent with the finding that Respondent rearragned routes, adding children to routes and docked pay when it learned of coffee breaks. Again the finding overlooks the fact that because Santillo's bus lacked a working tacograph and Santillo denied taking any breaks, Respondent did not have knowledge that Santillo was taking coffee breaks and therefore could not take corrective or other action (Tr. 200).

42. The finding under Findings of Fact, Section III.B., recited on page 15 that Respondent considered Santillo stopping at home to be just another unauthorized break.

The grounds for the exception are that the finding is not supported by the record. There is no evidence that Respondent equated Santillo stopping at home with taking coffee breaks. The record makes it clear that Respondent considered Santillo stopping at his home after completing his runs rather than returning directly to the garage a much more serious offense than taking coffee breaks and that this was the moving cause of Santillo's discharge.

43. The finding under Findings of fact, Section III.B., recited on page 16 that it is significant that Paterson never cautioned or admonished Santillo that taking coffee breaks or stopping at home might lead to dismissal or other disciplinary action [-23-] and this failure is not natural and is indicative of discriminatory motivation.

The grounds for the exception are that the finding overlooks the fact that without the tacograph, Respondent had no knowledge of Santillo taking coffee breaks (Tr. 200) and only learned of this practice when reding the tacograph

discs to find out if Santillo was stopping at home. The finding also overlooks the fact that before installing the new tacograph, Paterson twice questioned Santillo about stopping at home and both inquiries were met with denials. Paterson warning Santillo following Santillo's denial of the practice would have been incongruous.

44. The finding under Findings of Fact, Section III.B., recited on page 16 that Paterson took no action when it was first revealed that Santillo was taking unauthorized breaks.

The grounds for the exception are that the finding fails to consider the fact that the initial information was from incomplete test discs that come with new tacographs and that the test discs had not been correctly aligned on installation.

45. The finding under Findings of Fact, Section III.B., recited on page 16 that a three written warning system was utilized by Respondent, no written warning was issued to Santillo and therefore Santillo's conduct was not so serious as to warrant discharge until after Santillo's union activities.

The grounds for the exception are that this finding now apparently resolves the conflict in testimony between Paterson and Sulloway regarding the existence of a written warning system without any indiction of the basis for such resolution. The finding ignores Paterson's statement that no such system is utilized, ignores the fact that there is no evidence that any employee ever received a written warning, even those discharged, ignores the fact that Santillo never received a written warning concerning his drinking coffee while driving incident that was reported to Respondent by a school official, fails to comment on Sulloway's demeanor and fails to recognize that, even though the new tacograph was installed in Santillo's bus prior to his union activities, his taking unauthorized breaks was not established until after his union activities had begun.

46. The finding under Findings of Fact, Section III.B., recited on page 17 that the preponderance of the evidence establishes that Santillo was discharged in violation of Section 8(a)(1) and (3) of the Act and that even though Santillo's conduct was unsatisfactory, on the record as a whole, Respondent would not have discharged Santillo but for his union activities.

The grounds for the exception are that, for the reasons previously stated in these exceptions, the preponderance of the evidence establishes that Santillo was discharged for

taking unauthorized breaks for which he had been claiming and receiving payment, particularly the daily break when he stopped at his home after completing his runs, and, conversely, the preponderance of the evidence does not establish that Santillo's discharge was due to his union activities.

47. The finding under Findings of Fact, Section III.B., recited on page 17, footnote 20, that it was not an unusual procedure to have tacographs in buses.

[-25-] The grounds for the exception are, as previously stated, that the finding fails to recognize that although every other bus with one exception had a working tacograph, Santillo's bus did not have one from the beginning of that school year in September, 1978, until March 12, 1979 (one week before his union activites commenced) even though spare tacographs were available; that therefore the installation of a tacograph in Santillo's bus on March 12, 1979 was not the usual situation but was specifically installed at that time to determine whether, in fact, Santillo was stopping at his home as had been reported to Respondent but denied by Santillo.

48. Respondent, for the reasons previously cited, takes exception to the conclusions of law, remedy and recommended order recited on pages 17, 18, and 19 on the grounds that the same are not supported or warranted by the evidence.

49. Exception is taken generally to the selective recitation of evidence in the Decision which, as has been demonstrated, includes and/or misstates the evidence so as to support the ultimate conclusions, and excludes and/or misstates the evidence which is contrary to those ultimate conclusions.

50. Exception is taken generally to the style of the Decision which negatively characterizes the testimony of Paterson and Sulloway by the frequent use of words such as "claim", "allege", "asserts", and "according to", whereas the testimony of General Counsel's witnesses did not receive like negative characterization.

51. Exception is taken generally to the Decision's failure to state the inconsistencies and contradictions in Santillos testimony which reveal that it is unworthy of credence. These inconsistencies and contradictions include:

a. Santillo's direct testimony that he called Paterson to tell him not to take it personally after West told

Santillo tht Paterson was taking Santillo's union activities personally and that Paterson then made the statement he was going to pretend on Monday that he was mad at Santillo (Tr. 12, 13, 63, 64, 65). In cross-examination of Santillo it was revealed that in his affidavit to the NLRB. Santillo stated that he could not recall why he was talking with Paterson the time Paterson made the comment about pretending to be mad on Monday (Tr. 36, 37), and also revealed that in his affidavit to the NLRB, Santillo stated that his telephone conversation with Paterson concerning Paterson taking it personally took place a few days after his (Santillo's) discharge (Tr. 37-40).

b. Santillo's direct testimony that he took one coffee break every morning and another coffee break every afternoon (Tr. 22, 25, 26, 62). In cross-examination of Santillo it was revealed that in his affidavit to the NLRB, Santillo stated that other than the one occasion in September or October, 1978, he never took coffee breaks (Tr. 40, 41).

c. On crossexamination Santillo admitted that when Paterson questioned him about taking coffee breaks, he lied to Paterson by telling Paterson that he was not taking coffee breaks when, in fact, he had been doing so (Tr. 42). (The same untrue denial that Santillo was later to repeat in his NLRB affidavit).

d. On cross-examination Santillo at first denied that when Paterson spoke to him in September or October, 1978 concerning taking a coffee break, Paterson told him that he had spoken to him before about the same thing (Tr. 41). When confronted with his affidavit to the NLRB regarding this subject, Santillo admitted that Paterson did make such a statement to him (Tr. 41).

e. On cross-examination Santillo stated that when he received the telephone call from Paterson on the day of his (Santillo's) discharge, he contacted a union representative before seeing Paterson because he feared he was going to be fired and that he believed he was fired for union activities (Tr. 43); yet Santillo claims he did not make any statements about the Union to Paterson at the time because he was only concerned with being fired (Tr. 66), that

Paterson brought up the subject of the Union out of the blue by saying Santillo's firing had nothing to do with the Union (Tr. 65, 66), but Santillo finally concedes that it is possible he told Paterson that the reason he thought he was being fired was because of union activities (Tr. 43).

f. Santillo's direct testimony that when he stoped at his home in the afternoons he "... probably spent all of 10 minutes ..." (Tr. 23), and that "... he spent at least 10 minutes there ..." (Tr. 27). On cross-examination Santillo admitted that the stops were for "10 or 15 minutes" (Tr. 45), possibly as long as 20 minutes (Tr. 45, 46), and that in his affidavit to the NLRB he stated that the stops at his house were never for more than 10 minutes (Tr. 46). Santillo also stated he knew he was not authorized to take his bus home (Tr. 52).

g. On cross-examination Santillo at first testified that he stopped at his house before going back to the garage "... three times a week at least" (Tr. 45), then conceded it might have been four or five times a week (Tr. 45), then it might have been four or five times a week (Tr. 45), then conceded that it was pretty much on a daily basis (Tr. 62), and admitted that in his affidavit to the NLRB, he stated he only stopped at his house about twice a week (Tr. 46).

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CERTIFICATE OF SERVICE

I, C. Fred Welensky, attorney for Respondent, state that on March 14, 1980, I served the foregoing Exceptions on the parties hereto and the Regional Director by mailing copies thereof, postage prepaid as follows:

Robert S. Fuchs, Regional Director
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General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction Employees Local Union 404
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C. FRED WELENSKY

Supreme Court of the United States

No. 82-168

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORP.

ORDER ALLOWING CERTIORARI.
FILED NOVEMBER 15, 1982.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

Office - Supreme Court, U.S.
FILED
OCT 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-168.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
TRANSPORTATION MANAGEMENT CORPORATION,
RESPONDENT.

Brief in Opposition to a Petition for a Writ of Certiorari.

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Question Presented.

Whether a decision of the Court of Appeals, denying enforcement of, and remanding for further consideration, an order of the National Labor Relations Board ("Board") for failure to find that "... upon the preponderance of the testimony taken by the Board ...," as prescribed by Section 10(c) of the Act, is ripe for review by the Court.

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No. 82-168.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORPORATION,
RESPONDENT.

Brief in Opposition to a Petition for a Writ of Certiorari.

Opinion Below.

The opinion of the Court of Appeals appears in 674 F.2d 130 (1st Cir. 1982) and is reproduced herein as an Appendix at A.1.

Jurisdiction.

The jurisdiction of the Court is invoked under Title 28, United States Code, § 1254(1).

Statutes Involved.

The statute involved is Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160 (c) which provides, *inter alia* "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the Complaint has engaged . . . in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such . . . practice. . . . No Order of the Board shall require the reinstatement of any individual as

an employee who has been suspended or discharged, or the payment to him of any back pay if such individual was suspended or discharged for cause."

Statement of the Case.

Respondent is a corporation engaged in the transportation of special needs schoolchildren under contract with various cities and towns in the Commonwealth of Massachusetts. At the time of this action, it had a contract for such purpose with the cities of Springfield and Chicopee.

Employee Santillo, a driver for respondent, was employed in October, 1976 and discharged for cause on March 26, 1979.

Santillo was discharged because of his reported infractions of a number of respondent's bona fide rules of operation to wit: taking unauthorized breaks, leaving ignition keys in his vehicle, deliberately misreporting time worked for pay purposes. When evidence of Santillo's activities in this regard became provable he was discharged for cause. Credible evidence established that respondent's corrective actions commenced at a point in time prior to Santillo's alleged involvement with a labor union organization or his commencement of protected activities.

The Appeals Court, although concluding that the respondent's actions were union-oriented, found that "... the Board did not conclude that 'upon the preponderance of the testimony taken,' it was 'of the opinion' that the Company had engaged in an unfair labor practice" (A.2). In an unpublished report, the Appeals Court reached the same conclusion in *Heartland Food Warehouse v. NLRB*, 685 F.2d 421 (1982).

The matter was remanded to the Board for reconsideration in light of the Appeals Court's decision and its prior rulings, which have been otherwise supportive of the Board's attempt to establish a permissible standard by which to evaluate an employer's practice *vis-a-vis* Section 8(a)(1) and (a)(3) of the Act, 29 U:S.C., §§ 158(a)(1) and (a)(3), prescriptions, noting:

> While this court has upheld the Board's practice of imposing upon the Company the burden of *neutralizing* the implication of sufficient anti-union motive arising from the General Counsel's *prima facie* case, *Statler Industries, Inc.* v. *NLRB*, 644 F.2d 902 (1st Cir. 1981); *NLRB* v. *Amber Delivery Service, Inc.*, 651 F.2d 57 (1st Cir. 1981); *NLRB* v. *Cable Vision*, 660 F.2d 1 (1st Cir. 1981), it has rejected both explicitly, *NLRB* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), and implicitly, *NLRB* v. *Amber Delivery Service, Inc.*, 651 F.2d at 69; *NLRB* v. *Cable Vision*, 660 F.2d at 8; *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 n.12 (1st Cir. 1979), any effort by the Board to impose a *greater* burden than this upon the Company, as outside the Board's statutory authority. We therefore remand this case to the Board for reconsideration under the standard of *NLRB* v. *Wright Line, supra*. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). Since the Board's order is based in large part upon Santillo's discharge, we do not believe that partial enforcement at this time is appropriate.

(footnote omitted) (emphasis in original) (A.3).

Argument.

I. Appeals Court Review.

The Petitioner's brief in support of its writ of certiorari presents in a rather complex way what is otherwise a simple issue. The substance of this matter at this stage in its proceedings is not any alleged division among the several appeals courts regarding the nature and character of the test determinative of a violation of 29 U.S.C., §§ 158(a)(1) and (a)(3), but rather the appropriateness of its review by this Court.

The Appeals Court noted, without equivocation, that the Board failed to follow its own dictates when considering an

alleged violation of the aforecited statutory provisions, as detailed at length in *Wright Line and Lamoueux*, 251 NLRB No. 150 (1980); *NLRB v. Transportation Management Corp., supra.*

An appeals court is better able to review a conclusive administrative decision. In the instant matter such is lacking. Therefore, the remand for reconsideration must precede any review by this Court. *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941) (doubt as to whether the NLRB concluded that the employer was guilty of commission of unfair labor practice); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (remand to determine purpose and effect of plant closing); *NLRB v. National Motor Bearing Co.*, 105 F.2d 652 (9th Cir. 1939) (appeals court empowered to remand to NLRB for purpose of supplying essential finding).

II. Review by Supreme Court.

As a general rule, the Board has the burden, on a petition for review to this Court, to demonstrate how the judgment below is erroneous, *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941).

Where an assessment of a record is involved, this Court has denied review noting that it will not make an independent review of an appeals court decision. *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951). In the instant matter, the Appeals Court made an assessment of the Board's findings and conclusion, finding the latter wanting in finality and therefore, not determinative of the alleged violations by respondent. This provided justification for the remand; *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973) (whether record as a whole supports findings of the Board is within the keeping of the Appeals Court).

III. Statutory Prescription.

It is patently clear that 29 U.S.C., § 160(c) establishes the congressional intent regarding the party having the burden

of proof, to wit, the Board shall, based "upon the preponderance of the testimony taken . . . be of the opinion" that a violation of the Act has occurred. Notwithstanding Petitioner's extensive brief on what it considers the merits of the matter, the Appeals Court found that the Board has not completed its administrative assignment without which there can be no effective judicial review. Before this Court reviews a checkered history and performance on the part of the Board regarding 29 U.S.C., § 160(c), said Board ought to first come to rest upon a measurable standard appropriate to the practice of labor-management relations, enforce it consistently, thereby allowing the appellate process to be more orderly and thoughtful.

Conclusion.

For the reasons set forth above, the respondent submits that a writ of certiorari should not be granted in this matter.

Respectfully submitted,

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United States Court of Appeals, First Circuit.

No. 81-1537.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORP.,
RESPONDENT.

Argued Jan. 8, 1982.

Decided April 1, 1982.

Carol A. De Deo, Atty., Washington, D. C., with whom William A. Lubbers, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Robert E. Allen, Acting Associate Gen. Counsel, and Elliott Moore, Deputy Associate Gen. Counsel, Washington, D. C., were on brief, for petitioner.

C. Fred Welensky, Boston, Mass., for respondent.

Before COFFIN, Chief Judge, TIMBERS,* Senior Circuit Judge, and BREYER, Circuit Judge.

PER CURIAM.

[1] The National Labor Relations Board seeks enforcement against the Transportation Management Corporation (the "Company") of an order based upon Board findings that the Company violated § 8(a)(1)[1] and § 8(a)(3)[2] of the National

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* Of the Second Circuit, sitting by designation.

[1] Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in

Labor Relations Act. Several of the findings of § 8(a)(1) violations are adequately supported by the record. The record reveals, for example, that Paterson, a supervisor, spoke to West, an employee and the brother-in-law of Santillo, another employee who was a union activist. In the conversation Paterson referred to Santillo's union activity, suggested that he (Paterson) was taking it "personal," noted that he had previously given Santillo favors (such as letting him park his car in Paterson's yard and giving him time off in the summer to work on another job), and threatened that in the future "I'll remember it." Paterson also told a different employee, Baer, that he would "get even" with Santillo. While Paterson's motives were the subject of conflicting testimony, there is ample ground for a fact finder to conclude that Paterson's threats were union-oriented, gave an impression of surveillance, *see NLRB v. Rich's of Plymouth, Inc.*, 578 F.2d 880 (1st Cir. 1978), and constituted unlawful coercion. *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992, 996-97 (2d Cir. 1976), *cert. denied*, 430 U.S. 914, 97 S.Ct. 1325, 51 L.Ed.2d 592 (1977).

[2, 3] The Board also found the Company's discharge of Santillo unlawful under both §§ 8(a)(1) and 8(a)(3) of the Act. In making this finding, however, the Board did not conclude that "upon the preponderance of the testimony taken," it was "of the opinion" that the Company had engaged in an unfair labor practice. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c). Rather, it based its finding of a violation upon a conclusion that the Company "failed to meet its burden of *overcoming* the General Counsel's *prima facie* case

---

the exercise of the rights guaranteed in section 7 . . . ." 29 U.S.C. § 158(a)(1) (1976). Section 7 provides in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *Id.* § 157.

[3] Section 8(a)(3) provides in pertinent part: "It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (1976).

by establishing by competent evidence that Santillo would have been discharged even absent his union activities." (Emphasis added.) While this court has upheld the Board's practice of imposing upon the Company the burden of *neutralizing* the implication of sufficient anti-union motive arising from the General Counsel's *prima facie* case, *Statler Industries, Inc. v. NLRB*, 644 F.2d 902 (1st Cir. 1981); *NLRB v. Amber Delivery Service, Inc.*, 651 F.2d 57 (1st Cir. 1981); *NLRB v. Cable Vision*, 660 F.2d 1 (1st Cir. 1981), it has rejected both explicitly, *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), and implicitly, *NLRB v. Amber Delivery Service, Inc.*, 651 F.2d at 69; *NLRB v. Cable Vision*, 660 F.2d at 8; *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 n.12 (1st Cir. 1979),[3] any effort by the Board to impose a *greater* burden than this upon the Company, as outside the Board's statutory authority. We therefore remand this case to the Board for reconsideration under the standard of *NLRB v. Wright Line, supra. SEC v. Chenery Corp.*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943). Since the Board's order is based in large part upon Santillo's discharge, we do not believe that partial enforcement at this time is appropriate.

So ordered.

BREYER, Circuit Judge (concurring).

The Board, in oral argument in this case and in briefs in subsequent cases, has indicated an unwillingness to follow this court's decision in *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), and has asked for reconsideration. While I join the court's opinion here, I also concur separately to state my reasons for rejecting the Board's request.

First, I think the Board may overestimate the extent of the difference between its formulation and our own. Both Board and court agree that in a "dual motive" discharge case "the

[3] While *Statler Industries* did appear to approve the Board's *Wright Line* test, which imposes such a burden, it did not focus upon this particular subsidiary issue.

initial inquiry is whether the Board has made a *prima facie* showing that a 'significant improper motivation' underlay the Company's action." *NLRB v. Cable Vision*, 660 F.2d 1, 8 (1st Cir. 1981); *NLRB v. Amber Delivery Service*, 651 F.2d 57, 69 (1st Cir. 1981); *Statler Industries, Inc. v. NLRB*, 644 F.2d 902, 905 (1st Cir. 1981); *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979). In making this *prima facie* case, the Board must establish the "requisite knowledge by the Company of union activity." The "bad reason may [then] be shown by independent evidence or by the circumstances of the discharge itself." *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d at 670. Both Board and court also agree that thereafter "the burden . . . shifts to the Company to 'prove that it had a good reason, sufficient in itself, to produce' the [discharge] . . . *Statler Industries, Inc. v. NLRB*, 644 F.2d at 905, *quoting NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d at 671." *NLRB v. Cable Vision*, 660 F.2d at 8. But, the Board and court apparently do not agree about who should win if, after both sides have submitted their evidence, the evidence is in "equipoise."

We made clear both in *Cable Vision* and in *Amber Delivery* that in such a situation, the employer must prevail, for we wrote, "This shift [of the burden of proof to the Company] does not impose an overall burden upon the Company of proving itself 'innocent' of violating the statute. Rather it must simply come forward with enough evidence to convince the trier of fact that, under the circumstances, there is no longer a preponderance of evidence establishing a violation." *NLRB v. Cable Vision*, 660 F.2d at 8. This language generalized the court's statement in *Eastern Smelting* that when the employer presents evidence of a good and sufficient motive for the discharge, the Board "may not reject the employer's proof, absent a reasonable basis." *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d at 671 n.12. In turn, *Cable Vision* and *Amber Delivery* elaborated this point, and finally the point was analyzed still more carefully in *Wright Line*. Yet

there is nothing in *Wright Line* that reflected any departure from prior court decisions.

While the *Wright Line* formulation does, of course, mean that the employer wins in a case where the record cannot be fairly said to make out a violation by a preponderance of the evidence, this is surely what one would expect. *See Edison Co. v. Labor Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938). The burden of proof formulation does not itself add to, or detract from, the requirement of substantial evidence. *Cf. Miranda v. HEW*, 514 F.2d 996, 998 (1st Cir. 1975). Thus, I do not see the court's *Wright Line* formulation as being of great practical significance. *Wright Line*, for example, does not tell the Board what it can, or cannot, conclude from silences in the record; that is a matter governed by the facts of a particular case, experience, and common sense.[1] Rather, *Wright Line* simply tells the Board that after the evidence is in, it must itself make a judgment about whether the evidence *overall* does or does not support a finding of violation; it cannot avoid this issue by retreating to the language of "burdens of proof."

Second, as the court pointed out in *Wright Line*, the relevant statutes compel the result we reached. Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides that the Board must dismiss a complaint when "upon the preponderance of the testimony taken" the Board "shall not be of the opinion" that an unfair labor practice was committed. Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556, states that "Except as otherwise provided by

[1] *E.g.*, if I see water pouring down outside the window, I can reasonably infer that it is raining, although my inference in part depends upon the absence of evidence that there are small boys with a garden hose standing on the roof. Add to the record, however, the facts that there are such small boys and the sun is shining, and my inference of rain becomes unreasonable. If I try to support it by pointing to an *absence* of evidence in the record that the hose was turned on, I am still acting unreasonably. Because of the *facts* involved, a conclusion based in part upon the record's silence is reasonable in the first instance but not in the second. Most silences in an administrative record are of this factual sort; burden of proof rules only occasionally affect the conclusions that might be drawn from them.

statute, the proponent of [an] order has the burden of proof." And, the Board's rules themselves state that the Board's attorney has the burden of proof of violations of section 8." 29 C.F.R. § 101.10(b). How, in the face of this language, is it possible not to hold that the overall burden of proving a violation remains with the Board?

The Eighth Circuit has recently written that there is a "reasonable basis in law" for the Board's *Wright Line* burden shifting, apparently disagreeing as well with the narrow "overall burden" question at issue here. *NLRB v. Fixtures Mfg. Corp.*, 669 F.2d 547 at 550-551 n.4 (8th Cir. 1982)[2]. The Eighth Circuit rests its opinion, however, upon its belief that the "overall burden" question is one as to which a court should defer to agency views. I doubt that this is so: Whether the Board can impose such an overall burden on the employer is a pure question of law. It involves a major and important section of the authorizing statute; it is not "interstitial;" and the language of the statute as well as its legislative history seem clear. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491-93, 67 S.Ct. 789, 793-94, 91 L.Ed. 1040 (1947); *Constance v. Secretary of Health and Human Services*, 672 F.2d 990, 995 (1st Cir. 1982). The fact that the agency might find such burden shifting administratively useful would be significant had Congress intended to delegate such authority to the agency, but that is not the case here. *Social Security Board v. Nierotko*, 327 U.S. 358, 368-69, 66 S.Ct. 637, 642-43, 90 L.Ed. 718 (1946). Here the issue is one of statutory language and congressional intent. These indicate quite clearly that the Board, not the employer, must bear the overall burden of showing a violation of the Act.

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[2] There are decisions in other circuits either accepting—*NLRB v. Robin American Corp.*, 654 F.2d 1022 (5th Cir. 1981); *NLRB v. Consolidated Freightways Corp.*, 651 F.2d 436 (6th Cir. 1981); *Charge Card Ass'n v. NLRB*, 653 F.2d 272 (6th Cir. 1981); *Peavey Co. v. NLRB*, 648 F.2d 460 (7th Cir. 1981); *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905 (9th Cir. 1981)— or rejecting—*TRW, Inc. v. NLRB*, 654 F.2d 307 (5th Cir. 1981)—the Board's *Wright Line* test. But with the exception of *Fixtures*, and possibly *Nevis*, none has considered explicitly the point here at issue.

Finally, it is worth recalling that one major purpose underlying court review of administrative agency decisions is that of keeping agency action within statutory bounds laid down by Congress—including those statutory qualifications that limit the agency's more important basic mission. Stewart, *The Reformation of American Administrative Law*, 88 Harv.L.Rev. 1667 (1975). To do so, Congress had entrusted courts with primary responsibility for determining questions of law related to the agency's mission. Administrative Procedure Act § 10(e), 5 U.S.C. § 706. And, to prevent the agencies from extending that mission or escaping statutory limitations through one-sided fact-finding, Congress has required the courts to make certain that factual findings are supported by "substantial evidence" on the basis of the "whole record." *Id. See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-92, 71 S.Ct. 456, 463-67, 95 L.Ed. 456 (1951). This historic division of tasks between court and agency, and the major purpose uderlying it, suggests why it is desirable to require the Board to certify that, after hearing both sides, it still believes the evidence in the record by a preponderance shows a violation of the statute: Doing so forces the agency to focus directly on what Congress told it to do; it prevents the agency from retreating behind the opaque language of "burden of proof;" and it simplifies the work of a reviewing court, which would otherwise be uncertain as to when it could, and when it could not, properly overturn an agency decision. (Compare the difficulty of deciding whether there is substantial evidence on the record as a whole that the employer has not *proved* that the bad motive did *not* move him.)

In sum, this court's *Wright Line* opinion imposes little practical burden on the Board; it is required by statute; and it is, in terms of general agency/court relations, simplifying. I therefore think this court is correct in deciding not to modify it.

Office - Supreme Court, U.S.
FILED
OCT 25 1982
ALEXANDER L. STEVAS.

No. 82-168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRANSPORTATION MANAGEMENT CORP.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY URGING REVIEW BY THE COURT AND OTHERWISE SUPPORTING THE VIEWS OF RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

NO. 82-168

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

TRANSPORTATION MANAGEMENT CORP.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY URGING REVIEW BY THE COURT AND OTHERWISE SUPPORTING THE VIEWS OF RESPONDENT

To The Honorable, The Chief Justice and The Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Council On Labor Law Equality (COLLE) moves this Court for leave to file the attached brief as amicus curiae urging the Court to accept the National Labor Relations Board petition for certiorari but otherwise supporting the position of Respondent Transportation Management Corp. on the merits of the questions involved. In support of this motion, the Council On Labor Law Equality shows as follows:

1. The Council On Labor Law Equality (COLLE) is a national association of large and small employers formed to monitor the activities of the National Labor Relations Board and other developments relating to the NLRA and to give support in those cases or on those issues which affect a broad section of industry. COLLE was formed in recognition of the necessity for a specialized and continuing business community effort to provide assistance in the review of

NLRB and court decisions in order to maintain a balanced approach in the interpretation of national labor policy.

2. The questions presented for review in this case -- dealing with the burden of proof and the burden of persuasion in "dual motive" discharge cases -- is an issue that has been of particular concern to the Council On Labor Law Equality. Within the last year, COLLE has filed three separate briefs amicus curiae urging the Court to accept this question for review. Such briefs amicus curiae were filed in Wright Line, a Division of Wright Line, Inc. v. NLRB, 251 NLRB 1083; 662 F.2d 899 (1st Cir. 1981); cert. denied March 1, 1982, No. 81-987, ___ U.S. ___; Red Ball Motor Freight, Inc. v. NLRB, No. 81-1605, cert. denied May 24, 1982, ___ U.S. ___; Pettibone Corporation v. NLRB, No. 81-2116, cert. denied October 4, 1982, ___ U.S. ___. In each of the aforementioned cases, the questions presented to the Court were virtually identical. In each of the aforementioned cases, the National Labor Relations Board opposed review on the ground that the issues at that time

were not yet ripe for review.

3. In Red Ball Motor Freight, Inc. v. NLRB, supra, Justices White and Rehnquist issued a dissenting opinion indicating that they would grant review because questions presented in Red Ball, supra, squarely presented a ..."conflict on what is obviously a recurring issue that should be resolved."

4. The NLRB in its petition urging review in the instant case cites as support the aforesaid dissent from the denial of certiorari by Justice White in Red Ball, supra.

5. The members of COLLE, a cross section of large and small employers, consider the question of burden of proof and persuasion in NLRB dual motive discharge cases to be one of the most important questions confronting employers. The Government now has demonstrated by the instant petition that it concurs in the importance of this question and concurs that there are conflicting opinions of various courts of appeal that require the resolution of this important question. It is respectfully suggested

that the special interest of the amicus curiae, Council On Labor Law Equality, should be granted because while they concur with the position of the Government in urging that the questions presented be reviewed, they take serious exception to the other positions taken by the Government in their petition which tend to give support to the NLRB's "Wright Line" test under which employers must carry the ultimate burden of demonstrating that they did not have "just cause" for discharging an employee. As the Council On Labor Law Equality will take positions before this Court that in part are in agreement with the Government (in urging review), in part are in agreement with Respondent on the merits of the argument, and in part are in agreement with the decision of the First Circuit, it is respectfully urged that these additional positions to be urged upon the Court by COLLE should be heard.

6. The Solicitor General has granted consent to the filing of the instant brief amicus curiae urging the Court to

grant the petition, a copy of which has been lodged with the Clerk's office. Counsel for the Respondent, Transportation Management Corp., has indicated that his client is unwilling to grant consent as they are opposing the grant of certiorari in the instant matter.

WHEREFORE, it is respectfully moved that the Council On Labor Law Equality be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

Gerard C. Smetana
Counsel for the
Amicus Curiae
Council On Labor
Law Equality (COLLE)

October 22, 1982

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

NO. 82-168

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRANSPORTATION MANAGEMENT CORP.,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY URGING REVIEW BY THIS COURT AND OTHERWISE SUPPORTING THE VIEWS OF RESPONDENT

This brief amicus curiae on behalf of the Council On Labor Law Equality is submitted contingent upon the Court's granting of the accompanying motion, pursuant to Rule 42(3) of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is detailed in the preceding motion for leave to file a brief amicus curiae.

SUMMARY OF THE CASE

The Council On Labor Law Equality (COLLE) concurs with the Petitioner National Labor Relations Board that

> "The question presented in this case is of considerable practical importance to the administration of the National Labor Relations Act and the decision of the court of appeals squarely conflicts with the decisions of five other courts of appeal."

See NLRB Petition at p. 7.

The decision of the First Circuit below reaffirms the position of the First Circuit taken in Wright Line, a Division of Wright Line, Inc. v.

NLRB, 251 NLRB 1083; 662 F.2d 899 (1st Cir. 1981); cert. denied March 1, 1982, No. 81-987, ___U.S.___, in refusing to adopt the Board's then new "Wright Line" test for affixing the burden of proof in dual motive discharge cases. The facts in Transportation Management Corp. are typical of the kinds of questions that arise in these dual motive discharge cases. An employer discharges an employee for "just cause"; the NLRB determines that the employer also had knowledge that the employee so discharged was a union activist. It is the employer's position in this case that the appropriate standard here contrary to the standard urged by the NLRB is the standard that has been found to be appropriate by the Court in discharge cases, the same standard set forth by the Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 240 (1981). It is respectfully suggested that one of the reasons the Court should consider accepting this case for review is so that it can determine the need for accommodation of the Burdine standard in discrimination

cases and the NLRB's current Wright Line standard. It is the position of COLLE that in view of the explicit language in the National Labor Relations Act permitting an employer to discharge an employee for just cause that where an employer, as in the instant case, sets forth a justifiable business reason for the action taken, the NLRB has not sustained its statutory burden.

The instant brief will outline why the allocation of the burden of proof in NLRB unfair labor practice cases is ripe for review and suggest the need for a uniform burden of proof and related questions presented in Connick v. Myers, No. 81-1251, cert. granted March 8, 1982, and will suggest the need for an appropriate accommodation between the Court's apparently divergent views on the question of the burden of proof as expressed in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), and as contrasted to Texas Department of Community Affairs v. Burdine, supra. The argument will explore why each of the aforementioned factors require that

review be granted at this time.

I

REASONS FOR GRANTING THE WRIT

The NLRB's Wright Line Standard Shifting The Burden Of Proof Of Persuasion Upon Employers Is One Of The Most Important Questions Confronting Employers Upon Which The Courts Of Appeals Are Divided And Which Is Contrary To The Design Of The Statute

The petition by the NLRB in the instant case is the fourth time within the last year that the question of the appropriate burden of proof in unfair labor practice discrimination cases has come before this Court [1]. The instant

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[1] COLLE has filed a brief amicus curiae urging review of this question in Wright Line, a Division of Wright Line, Inc. v. NLRB, 251 NLRB 1083; 662 F.2d 899 (1st Cir. 1981); cert. den. March 1, 1982, No. 81-987, ___U.S.___; Red Ball Motor Freight, Inc. v. NLRB, No. 81-1605, cert. den. May 24, 1982, ___U.S.___; Pettibone Corporation v. NLRB, No. 81-2116, cert. den. October 4, 1982, ___U.S.___. On each of the aforesaid occasions, the NLRB has opposed review for the reason that the issue was not at that time ripe.

case is the first time the NLRB urged the Court to accept this question for review. COLLE, the amicus curiae herein, urges that the Court review these questions, in agreement with the position of the Government, that these are important questions and that the decision below "squarely conflicts with the decision of five other courts of appeal." (See p. 7 of the Petition and discussion following, pp. 7 - 10).

In Wright Line, a Division of Wright Line, Inc. v. NLRB, supra, the question was presented in the context of the overall importance of the issue and the failure of the First Circuit to follow the "dominant motive" test which had been the test followed by that Circuit for many years. It was the position of Wright Line, as supported by COLLE, that the Board's newly adopted Wright Line doctrine in reliance upon the Court's Mt. Healthy decision, supra, was simply a recasting of the prior "in part" test. It continues to be the position of COLLE that the Board and its General Counsel continue to adhere to a standard that

places the burden upon the employer to prove that no part of alleged discriminatory conduct is for a reason protected under Section 7 of the Act [2].

In Wright Line, supra, the opposition of the government suggested that the issue was not yet ripe for review as most of the courts of appeal were following the Board's "Wright Line" test. The Government, in the instant petition, contrary to its opposition in Wright Line, now urges the Court to accept the case for review. COLLE pointed out in its brief amicus curiae in Red Ball, supra, that even those courts of appeal that have adopted the Board's Wright Line approach have not clearly recognized it to be a departure from the "in part" analysis that had previously been the Board's standard.

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[2] The First Circuit in the instant case reaffirms its decision in Wright Line and the Government in the instant petition urging review has apparently reversed its prior opposition filed in the Wright Line case because of the intervening decisions by other courts of appeal rejecting the NLRB's

In Red Ball, the government again principally adopted the opposition it had prepared in Wright Line as the basis for its successful opposition to the granting of review. Red Ball was the first case in which the Court of Appeals had taken direct issue with the views of the First Circuit in Wright Line.

COLLE, which represents a cross-section of large and small employers throughout the United States, fully concurs in the dissenting views expressed by Justice White and Justice Rehnquist in their Memorandum in Red Ball Motor Freight v. NLRB, supra. The dissenting views of Mr. Justice White correctly articulate the division in the circuit courts on the question of whether or not it is the employer or the General Counsel that has the final burden of persuasion in an unfair labor practice case and correctly suggests that this is an important issue that should be resolved.

Wright Line approach. See Behring International, Inc. v. NLRB, 675 F.2d 83 (3d Cir. 1982); NLRB v. Webb Ford, Inc., decided 9/27/82, No. 81-3022, 7th Cir., ___F.2d ___.

In view of the Government's recognition in its petition that the dissenting views of Justices White and Rehnquist should now be followed, COLLE respectfully suggests that the Court once again consider the importance of these questions and agree to grant review[3].

II

THE NLRB'S WRIGHT LINE STANDARD IS INCONSISTENT AND IN CONFLICT WITH THE DECISIONS OF THIS COURT

A. The NLRB Wright Line Standard Is An Improper Variation Of The Mt. Healthy Standard

In Wright Line v. NLRB, supra, the Board ostensibly backed away from the "in part" test and claimed to be adopting the test set down by this Court in Mt. Healthy Board of Education v. Doyle, supra. Under the Court's Mt. Healthy burden of proof standard, an employee who is the alleged discriminatee bears

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[3] COLLE does not agree with the arguments presented by the Government in its petition except to the extent that the Government acknowledges the conflict in the circuits and acknowledges the importance of resolving that conflict.

the burden of establishing a threshold showing that the conduct in question is protected and was a "...substantial or motivating factor in the actual discharge." 429 U.S. at 286. Mt. Healthy suggests that the appropriate standard in measuring the burden of proof should be the "dominant motive" test. A true Mt. Healthy test contemplates a dominant motive analysis. See "Toward Rationality In Discrimination Discharge Cases, The Impact Of Mt. Healthy Board of Education v. Doyle Upon The NLRA," 66 Georgetown Law Journal 1109 (1978). William H. DuRoss, now Associate Solicitor, U. S. Department of Labor, analyzed this Court's Mt. Healthy decision in terms of the divergent views of the various circuit courts and correctly concluded that the ..."proper balance between the employer's ... right to exercise control over his work force and the employee's right to be protected from discrimination based on pro-union activity" ... is the "dominant motive" test as articulated by the Court in Mt. Healthy in the context of the First

Amendment and as set forth by the First Circuit in NLRB v. Whitten Machine Works, 204 F.2d 883 (1st Cir. 1953), enforcing 100 NLRB 279, 66 Georgetown Law Journal 1109, 1110, 1111 and 1114. In Whitten Machine, the First Circuit placed the burden of proof in dual motive discharge cases upon the NLRB holding that an employee's discharge would violate the Labor Act only when the protected activity ... "weighed more heavily on the decision to fire [the employee] -- than did the dissatisfaction with his performance ...", 204 F.2d 883 at 887. Mr. DuRoss, in his Law Review Article, aptly points out that the First Circuit ten years later in NLRB v. Lowell Sun Publishing, 320 F.2d 835, reversing in part 136 NLRB 206 (1967), held that in applying the "'dominant motive' standard ... the Board must prove that 'but for' pro-union activity, the employer would have considered the employee's misconduct grounds for discharge." 66 Georgetown Law Journal at 1111.

The best analysis of what the Board's Wright Line approach really is can be found in the 45th Annual Report of the NLRB for the year 1980, in which the Board places its Wright Line standard in perspective. See Exhibit A attached to this Brief. In this annual report, the Board refers to the Mt. Healthy test as requiring that:

> ... the General Counsel to make a prima facie showing sufficient to support the inference that an employee's protected conduct was a motivating factor in the employer's disciplinary action. Once this is established, the burden will then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

See Exhibit A-1. The Board, thus, has shifted away from the "but for" analysis called for in Lowell Publishing and has shifted away from a strict following of Mt. Healthy by merely requiring that some evidence be established by the General Counsel from which an "inference" could be

drawn that the proscribed conduct was a motivating factor. The "but for" test, rather than being placed upon the Board, is placed upon the employer. This is not a correct "dominant motive" test and not a correct Mt. Healthy standard. The Board's Annual Report acknowledges that its interpretation of Mt. Healthy does not include an adoption of the "dominant motive" test (see attached Exhibit A-3). The Board acknowledges in the Annual Report that:

> ... under the "dominant motive" test, the General Counsel not only has to establish a prima facie showing of unlawful motive but he is also required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place place in the absence of the employee's protected activities.

Exhibit A-3 attached.

We respectfully suggest that the "dominant motive" test is the test that is consistent with the statutory design of the Labor Act rather than the Board's Mt. Healthy interpretation. We submit that the Board improperly relied upon Mt. Healthy as being consistent with NLRB v.

Great Dane Trailer, Inc., 388 U.S. 26. The Board's 1980 Annual Report states:

> ... "the shifting burden process in Mt. Healthy was consistent with the process envisioned by Congress (and the Supreme Court's Decision in Great Dane)."
> [See attached Exhibit A-3 & 4.]

We respectfully suggest, consistent with the views of Mr. DuRoss and his learned Law Review article, that in Great Dane the Court in fact removed the burden of proof from the NLRB only in a limited group of cases in which "the employer's discriminatory conduct could be inherently destructive." 66 Georgetown Law Journal 1109 at 1126.

B. The Tension Between Texas Dept. of Community Affairs v. Burdine And Mt. Healthy Should Also Be Resolved In NLRB Discrimination Cases

The Court has granted certiorari in Connick v. Myers, No. 81-1251, on March 8, 1982. In Connick v. Myers, the Court will decide the appropriate standard and burden of proof with regard to the dismissal of a public employee. The Petitioner in

Connick correctly urges that there is need to resolve the conflict between Burdine and Mt. Healthy. Similarly, in the private sector, in matters involving the NLRA, the tension between Mt. Healthy and Burdine must be addressed. It is especially appropriate to review the instant case as a related case to Connick v. Myers as the NLRB in its Wright Line standard has relied upon the Court's Mt. Healthy decision. The amicus curiae respectfully suggests that Burdine more accurately reflects the appropriate burden of proof required under the National Labor Relations Act. In considering the tension between Mt. Healthy and Burdine, the Court will also have the opportunity of considering the appropriateness of the "dominant motive" standard as originally enunciated by the First Circuit rather than the Board's current interpretation of Mt. Healthy.

CONCLUSION

For the reasons set forth herein, COLLE respectfully urges that the instant petition of the NLRB for certiorari should be granted.

Respectfully submitted,

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October 22, 1982

B. Employer Discrimination in Conditions of Employment

1. Proof of Discriminatory Motivation

In Wright Line, a Div. of Wright Line,[56] the Board formally set forth a test of causation, based on an analysis akin to that used by the Supreme Court in Mt. Healthy[57] for all cases alleging violations of section 8(a)(3) or violations of section 8(a)(1) turning on employer motivation. In adopting what it referred to as the Mt. Healthy test, the Board stated tht it first shall require the General Counsel to make a prima facie showing sufficient to support the inference that an employee's protected conduct was a motivating factor in the employer's disciplinary action. Once this is established, the burden will then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

After discussing the distinction between pretext and dual motive, the "in part" test, and the advent of the "dominant motive" test and the law of the

[56] 251 NLRB No.150 (Chairman Fanning and Members Penello and Truesdale, Member Jenkins concurring).

[57] Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274 (1977).

courts, the Board examined the Mt. Healthy case, where an untenured teacher had brought suit against the school board, alleging that it had wrongfully refused to renew his contract. The district court found that of the two reasons cited by the school board for its action, one involved unprotected conduct while the second was clearly protected by the first and fourteenth amendments. The district court reasoned that since protected activity had played a substantial part in the school board's decision, its refusal to renew the contract was improper and the teacher was, therefore, entitled to reinstatement and backpay. After the court of appeals affirmed, per curiam, the Supreme Court reversed, in a unanimous opinion, rejecting the lower court's application of such a limited "in part" test and ruling that the school board must be given an opportunity to establish that its decision not to renew would have been the same if the protected activity had not occurred. Thus, in the Board's view, the Court established the two-part test, described above, to be applied in a dual-motivation context.

The Board concluded that Mt. Healthy represents a rejection of the "in part" test which stops with the establishment of a prima facie case or a consideration of an improper motive. It also found that the "dominant motive" test fared no better because Mt. Healthy shifted the burden of proof to different parties. Under the "dominant motive" test, the General Counsel not only has to establish a prima facie showing of unlawful motive, but he is also required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place in the absence of the employees' protected activities. However, under Mt. Healthy, after the General Counsel establishes a prima facie case of employer reliance on protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity. In the Board's view, this distinction is a crucial one since the decision as to who bears this burden can be determinative.

After considering the legislative history of the Act and the Supreme Court's

decision in Great Dane [58], the Board concluded that the shifting burden process in Mt. Healthy was consistent with the process envisioned by Congress and the Supreme Court to resolve discrimination cases. Further, it pointed out that, although not couched in the language of Mt. Healthy, this is the same process that the Board has sought to use in analyzing such issues. Thus, the Board's decisional process traditionally has involved, first, an inquiry as to whether protected activities played a role in the employer's action and, if so, a subsequent inquiry as to whether any legitimate business reason asserted by the employer is sufficiently proven to be the cause of the discipline to negate the General Counsel's showing of prohibited motivation.

Perhaps most important for its purposes is the fact that the Mt. Healthy procedure accommodates the legitimate competing interests inherent in dual-motivation cases, while at the same time serving to effectuate the policies and objectives of section 8(a)(3) of the Act.

[58] N.L.R.B. v. Great Dane Trailers, 388 U.S. 26 (1967).

Under this test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision, while the employer is provided with a formal framework within which to establish that the discipline or other action would have occurred absent the employee's protected activities. Further, the Board found it to be of substantial importance that its explication of this test of causation will serve to alleviate the confusion which now exists at various levels of the decisional process by providing litigants and the decisionmaking bodies with a uniform test to be applied in 8(a)(3) cases. Finally, the Board recognized that inherent in the adoption of the Mt. Healthy test is its recognition of the advantage of clearing the air by abandoning the "in part" language in expressing its conclusion as to whether the Act was violated without repudiating the well-established principles and concepts which have been applied in the past.

In applying the Mt. Healthy test to the facts in the instant case, the Board found that the General Counsel had made a prima facie showing that the employee's union activity was a motivating fact in the employer's decision to discharge him, and that the employer failed to demonstrate that it would have taken the same action against the employee in the absence of his engaging in union activities. For these reasons, they agreed with the administrative law judge's finding that the employer violated section 8(a)(3) of the Act.

Concurring Member Jenkins was willing to apply the shifting burden-of-proof standard his colleagues adopted in this case. Although finding that this standard may suffice for most cases, he stated that there may remain a residue, perhaps small, of cases of mixed motive or cause, where the purposes are so interlocked that it is not possible to point to one of them as "the" cause. Where the evidence does not permit the isolation of a single event or motive as the cause of the discharge, Member Jenkins concluded that the unlawful motive must be deemed to be part of the

cause of discharge, and the discharge is unlawful. In his view, it is fair that the party who created this situation, in which isolation of a single cause is impossible, bear the burden created by the venture into an area prohibited by the Act. Member Jenkins therefore found that the "in part" standard as distinguished from the "but for" and "dominant motive" tests is the only criterion which will effectuate the purposes of the statute. Noting that the legislative hsitory shows plainly that Congress itself struck this balance, he read Mt. Healthy as also in effect adopting this standard. His only reservation now is the way in which the shifting burden-of-proof standard may be applied to prevent unlawful conduct. If experience shows it to be inadequate in application, he believed that modification may be required.

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

No. 82-168

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRANSPORTATION MANAGEMENT CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), if its hostility to an employee's protected union activities is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activities.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-168

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRANSPORTATION MANAGEMENT CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a)[1] is reported at 674 F.2d 130. The decision and order of the National Labor Relations Board (Pet. App. 10a-16a) and the decision of the administrative law judge (Pet. App. 17a-45a) are reported at 256 N.L.R.B. 101.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on April 1, 1982. On June 18, 1982, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including July 30, 1982. The

[1] "Pet. App." refers to the appendix to the petition for writ of certiorari; "J.A." refers to the joint appendix prepared pursuant to Rule 30.

petition was filed on that date and was granted on November 15, 1982 (J.A. 130). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in pertinent part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of

this Act: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

STATEMENT

1. Respondent provides transportation services to various local school boards in Massachusetts. On Monday, March 19, 1979, Sam Santillo, a school bus driver employed by respondent, and a fellow employee visited the offices of a local of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the union"). They met with union officials and discussed union representation for respondent's drivers, and Santillo signed an authorization card designating the union as his collective-bargaining representative (Pet. App. 18a, 19a; J.A. 10-11). During the following week Santillo spoke to a number of fellow employees about the union, learned that some were interested, and obtained and distributed additional authorization cards. Several employees signed the cards and returned them to Santillo (Pet. App. 19a; J.A. 11-12, 19). On Saturday, March 24, Santillo telephoned nearly all of respondent's 70 drivers and told them of a union organizational meeting scheduled for Monday evening, March 26 (Pet. App. 19a, 24a; J.A. 12-13, 29).

During the same week, beginning on March 22, George Patterson, respondent's area manager in Santillo's area, conducted what the Board found to be "an extensive campaign of interrogating a number of employees about their union activities," and thereby "ascertained that Santillo was one of the prime organizers of the union campaign" (Pet. App. 10a-11a, 19a-23a; J.A. 9, 38-40, 63-65, 83-84, 86-88). At one point, Patterson told employee Baer that he had learned of Santillo's involvement with the union, that Santillo was "two faced," and that he was "going to get even with Santillo" (Pet. App. 20a; J.A. 87). Patterson also asked employee West, who was Santillo's

brother-in-law, "What's with Sam and the Union?"; when West gave a noncommital response, Patterson stated that he took Santillo's activities "'personal,'" referred to certain favors he had extended to Santillo in the past, and said that he would "remember" Santillo's union activities when Santillo sought such favors in the future (Pet. App. 20a; J.A. 83-84). On Saturday morning, Santillo, having learned of Patterson's statements, telephoned Patterson; both were conciliatory, but Patterson said that, when Santillo came to work on Monday, Patterson would "have to pretend in front of other employees that he was mad at Santillo" (Pet. App. 21a; J.A. 12, 31-32).

The following Monday, March 26, Patterson fired Santillo "for leaving his keys in the bus, and taking unauthorized breaks" (Pet. App. 24a). Santillo asked to have the reasons for his discharge put in writing; after discussing Santillo's union involvement by telephone with respondent's president, Patterson refused this request. When Santillo said he would challenge his firing, Patterson said: "By the way this has nothing to do with the Union" (Pet. App. 24a-25a; J.A. 14-15, 32-33, 44-45, 59-60, 69-71).

2. The Board affirmed the decision of the administrative law judge. It found that Santillo's discharge violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), which makes it an unfair labor practice for an employer "by discrimination in regard to * * * tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[2] In reaching this conclusion,

[2] The Board concluded that respondent's violation of Section 8(a)(3) also constituted a violation of Section 8(a)(1), 29 U.S.C. 158(a)(1), which prohibits an employer from interfering with or restraining employees in the exercise of rights guaranteed by Section 7, 29 U.S.C. 157. In addition, the Board upheld the administrative law judge's findings that respondent violated Section 8(a)(1) by threatening and coercively interrogating employees and by creating the impression that employees were under surveillance

the Board applied the test it had articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, No. 81-987 (Mar. 1, 1982). In *Wright Line* the Board explained that, in determining whether an employer's action violated Section 8(a)(3), it would first require the General Counsel to show that the employer's opposition to the employee's protected activities was a "motivating factor" in the employer's decision to discipline the employee. If the General Counsel made this showing, the Board—explicitly following this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977)—ruled that the employer nevertheless could avoid an unfair labor practice finding if it demonstrated that it would have taken the same action even if the employee had not engaged in protected activities. 251 N.L.R.B. at 1089.

In this case, the Board concluded, the General Counsel established that respondent "evidenced a strong union animus," that it "had knowledge of Santillo's union activity and * * * intended to retaliate against Santillo" because of that activity, and that it discharged him the first working day after a company official threatened to "get even" with Santillo for his active union support (Pet. App. 12a). The Board accordingly found that the General Counsel had "established by strong and credible evidence a *prima facie* case for finding that Santillo was discharged in violation of Section 8(a)(3)" (*ibid.*).

The Board then considered whether respondent "has shown, by other evidence, that Santillo's discharge would have occurred without regard to these considerations" (Pet. App. 12a). The first reason respondent offered for discharging Santillo was that he had left his keys in his bus. The Board noted that the evidence showed that it was not uncommon for drivers to leave their keys in the buses and that Patterson had admittedly decided to dis-

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because of union activities (Pet. App. 10a-11a, 40a). The court of appeals sustained these latter findings (*id.* at 2a), and no issue concerning them is presented here.

charge Santillo before he learned that Santillo had left his keys in the bus on the day of the discharge (*id.* at 12a, 29a-31a, 36a; J.A. 17, 33-34, 50-52, 67-69, 89). It therefore concluded that this was a "purely pretextual reason which does more to detract from the lawfulness of the discharge than support it" (Pet. App. 12a). Respondent's second alleged reason was that Santillo took unauthorized coffee breaks. The Board found that this too was "normal practice among the drivers" and that it was "tolerated unless [it] * * * adversely affected the driver's job performance," in which case respondent might take some nondisciplinary corrective action, such as changing the driver's route (*id.* at 12a-13a). But the Board found that no driver had ever been disciplined, "much less * * * suspen[ded] or discharge[d]," for this reason (*id.* at 13a; see also *id.* at 25a-28a, 37a; J.A. 16-17, 33, 71-76, 84-85, 88, 90-94).

The final reason offered by respondent was that Santillo made unauthorized stops at his home. While the Board acknowledged that respondent did not condone this practice, it found that respondent did not confront Santillo when it first confirmed that he was making such stops, that it did not warn him of the possible consequences, and that it did not "follow its regular procedure of [issuing] three written warnings before [a] discharge" (Pet. App. 13a; see also *id.* at 28a-29a, 37a, 38a; J.A. 44, 66-68, 77-79, 104-105). The Board therefore concluded that respondent had not "establish[ed] * * * that Santillo would have been discharged, even absent his union activities" and accordingly had not met its burden of overcoming the General Counsel's case (Pet. App. 13a). The Board ordered Santillo reinstated with backpay (*id.* at 13a-14a, 42a).

3. The court of appeals refused to enforce the Board's order, citing its prior holding that the Board's *Wright Line* test is inconsistent with the National Labor Relations Act. In its earlier opinion, *NLRB* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), the court of appeals had concluded that, even if the General Counsel had shown

that an impermissible motive underlay an employer's action against an employee, the employer had only the burden of *producing evidence* that it would have taken the same action for permissible reasons. *Id.* at 905.[3] The court in the present case stressed that it rejected a test that places on an employer that has been shown to have acted for an impermissible reason the burden of "overcoming" the General Counsel's case, i.e., of proving by a preponderance of the evidence that it would have taken the same action for legitimate reasons (Pet. App. 3a, citing *NLRB* v. *Wright Line*, *supra*). The court remanded the case to the Board for reconsideration under the standard it had specified (Pet. App. 3a).

SUMMARY OF ARGUMENT

The Board, in its *Wright Line* decision, 251 N.L.R.B. 1083, properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act if its hostility to an employee's protected union activity is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activities. The court of appeals incorrectly rejected the Board's application of the *Wright Line* standard for allocation of burden of proof, holding that in a dual motive Section 8(a)(3) case the employer should bear only the burden of production of evidence that legitimate factors motivated its decision, not the burden of persuasion that those factors actually caused the discipline or discharge.

1. The court of appeals improperly disregarded Congress's approval of the test previously applied by the

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[3] In *Wright Line* itself the court enforced the Board's order, because it concluded that the feature of the Board's test it had rejected was not material to the outcome of the case before it. 662 F.2d at 907-909.

Board, which was substantially identical to the later *Wright Line* formulation for allocation of the burden of proof. Under the Wagner Act, passed in 1935, the Board held consistently that an employer that had been shown to be motivated in part by unlawful considerations in discharging an employee violated Section 8(a)(3) unless it could show that it would have taken the same action in the absence of the employee's protected activity. In 1947, during Congress's consideration of the Taft-Hartley amendments, industry representatives criticized that approach and persuaded the House of Representatives to adopt language that would have required the General Counsel to prove that an employee was not discharged for cause. However, Congress rejected the House language. Members of the conference committee, including Senator Taft himself, stated that the language eventually adopted was designed to reaffirm the Board's existing practice, which placed on the employer the burden of proving that it would have taken the action at issue for lawful reasons. Thus, the aspect of the Board's *Wright Line* test that the court below rejected is precisely the practice that was approved by Congress in 1947.

2. a. In *Wright Line*, the Board allocated the burden of proof in Section 8(a)(3) cases in a manner consistent with its long-standing practice approved by Congress, but reformulated its approach based on this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). The Board believed that such a reformulation would help to eliminate the confusion that had arisen in the courts of appeals in connection with the Board's approach to dual motive Section 8(a)(3) cases. *Mt. Healthy* involved the analogous problem of the discharge of a public employee for two different reasons, one legitimate and the other based on opposition to constitutionally protected conduct engaged in by the employee. In light of the similarity between dual motive Section 8(a)(3) cases and situations such as that in *Mt. Healthy*, the Board properly adopted the Court's con-

clusion that, once the employee had shown that protected conduct was a "motivating factor" in the employer's decision, the burden shifted to the employer to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.

b. The court below erred in concluding that the Board exceeded its statutory authority and acted contrary to established principles of proof in applying the *Mt. Healthy* allocation of burden of proof to Section 8(a)(3) cases. The court's conclusion appears to be based on a misunderstanding of the nature of the prima facie case the General Counsel must make under *Wright Line*. That prima facie case does not consist merely of enough evidence to support a presumption that the employer has acted unlawfully; rather, the General Counsel must show, by a preponderance of the evidence, that the employer in fact was motivated, at least in part, by opposition to the employee's protected activity. In view of the General Counsel's showing of conduct that effectively constitutes a violation of Section 8(a)(3), the employer clearly must do more than demonstrate that there was a legitimate reason that *could* have motivated its action, which is the only showing required by the court of appeals. In order to avoid liability, the employer must establish as an affirmative defense that its unlawful conduct was harmless, since it would have taken the same action in the absence of the unlawful motive. This approach is fully consistent with Section 10(c) of the Act and with established principles of proof. Indeed, the legislative history of the 1947 amendments makes clear that Congress intended that the burden of proof remain on the employer to show that it would have taken the action in question for legitimate reasons, even in the absence of the employee's protected activity. The formulation proffered by the court of appeals would diminish substantially the protection afforded to employees under the Act by requiring the General Counsel to assume not only the burden of dem-

onstrating an unlawful motive for an employer's action, but also the difficult task of proving a negative—that there was no legitimate reason that might have caused the employer to take the same action regardless of the protected activity. On the other hand, since the employer is in the best position to know, and thus to prove, whether it was motivated by legitimate reasons, the Board's *Wright Line* formulation places an entirely proper burden on the employer.

c. The court below suggested (662 F.2d at 907) that the Board's *Wright Line* allocation of burdens of proof is somehow inconsistent with this Court's decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). In fact, *Wright Line* and *Burdine* are fully consistent. The Court in *Burdine* described the manner in which a plaintiff could go about proving the ultimate fact of an employer's discriminatory motive in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The ultimate showing made by the Title VII plaintiff is similar to the proof of discriminatory motive that the General Counsel must make under *Wright Line*. Only when the General Counsel makes such a showing does *Wright Line* provide that the burden shifts to the employer to demonstrate that it would have taken the same action in the absence of the protected activity. This is a stage that is not reached in the *Burdine* analysis, which deals only with the plaintiff's proof of discriminatory motive. However, in other Title VII cases this Court has indicated that, once discrimination has been proved, the employer can avoid reinstatement and an award of back pay only if it can show that it would have taken the same action in the absence of the discrimination. See *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 404 n.9 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772-773 & n.32 (1976). Thus, *Wright Line* is consistent with the Title VII precedents.

3. The Board's determination that respondent did not meet its burden of showing that it would have discharged Santillo even in the absence of his union activity is supported by substantial evidence on the record as a whole. Although the General Counsel met his burden of establishing that respondent's union animus was a motivating factor in its decision to discharge Santillo, respondent did not succeed in demonstrating that any or all of its three alleged reasons—Santillo's leaving his keys in his bus, his coffee breaks, and his unauthorized stops at home—would have caused it to discharge Santillo regardless of his union activity. Thus, the court of appeals should have enforced the Board's order.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT AN EMPLOYER VIOLATES SECTION 8(a)(3) OF THE NATIONAL LABOR RELATIONS ACT IF ITS HOSTILITY TO AN EMPLOYEE'S PROTECTED UNION ACTIVITY IS SHOWN BY A PREPONDERANCE OF THE EVIDENCE TO BE A MOTIVATING FACTOR IN ITS DECISION TO DISCHARGE THE EMPLOYEE, AND THE EMPLOYER CANNOT ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT IT WOULD HAVE DISCHARGED THE EMPLOYEE FOR LEGITIMATE REASONS, ABSENT HIS UNION ACTIVITIES

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization * * *." This provision "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them"; however, the "employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301

U.S. 1, 45-46 (1937). See also *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667, 675 (1961). The General Counsel of the Board, who is vested with the responsibility for prosecuting unfair labor practice cases before the Board, 29 U.S.C. 153(d), must prove an unfair labor practice "upon the preponderance of the testimony taken." 29 U.S.C. 160(c).[4] The Board may not order reinstatement or back pay for any employee who was "suspended or discharged for cause." *Ibid.*

The basic question in this case involves the scope of the General Counsel's burden of proof in "dual motive" Section 8(a)(3) cases, i.e., cases in which the decision to discipline an employee is motivated both by opposition to the employee's engaging in union or other protected activities and by a legitimate business reason.[5] For more than 40 years, the Board has taken the position that, once the General Counsel has shown by a preponderance of the evidence that an employee's protected activity was a motivating factor in the employer's decision to discharge or discipline the employee, a violation of Section 8(a)(3) is established unless the employer shows by a preponderance of the evidence that it would have taken the same action for legitimate reasons, absent the employee's protected activities. In the Board's view, this standard properly accommodates the interests of both employers and employees and takes account of both the purposes of the Act and the practical aspects of proof. Congress expressly rejected an attempt to overrule the Board's standard at the

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[4] See also Section 101.10(b) of the Board's Rules and Regulations, 29 C.F.R. 101.10(b), which provides in pertinent part:

> The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act * * *.

[5] In addition to "dual motive" cases are so-called "pretext" cases, in which the General Counsel shows that an employer's asserted reason for its action is a sham. Since there is no legitimate business justification for the decision, there is no dual motive, but only an unlawful one. See *Wright Line, supra*, 251 N.L.R.B. at 1083-1084.

time of passage of the Taft-Hartley amendments in 1947, thus indicating approval of the Board's well-established practice.

The Board has continued to follow the same approach in dual motive cases, and, several years ago, in its *Wright Line* decision, 251 N.L.R.B. 1083, reformulated its test by adopting the framework set out by this Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). *Mt. Healthy* involved denial of tenure to a public employee based on dual motives, one proper and the other improper. The Court in *Mt. Healthy* held, *inter alia*, that the fact that constitutionally protected conduct had played a " 'substantial part' " in a public employer's decision not to rehire an employee would not necessarily justify reinstatement and an award of back pay. *Id.* at 285. Instead, the Court held that the initial burden was properly placed on the employee to show that his conduct was constitutionally protected and was a substantial factor, or motivating factor, in the employer's decision not to rehire him; however, once the employee had carried that burden, the lower court should have proceeded to determine whether the employer "had shown by a preponderance of the evidence that it would have reached the same decision * * * even in the absence of the protected conduct." *Id.* at 287. Following the *Mt. Healthy* approach, the Board indicated that, once the General Counsel shows that protected activity was a motivating factor in the discharge of an employee, the burden shifts to the employer to show that it would have taken the same action for legitimate reasons absent the protected activity. 251 N.L.R.B. at 1089.

Despite the apparent consistency of the *Wright Line* test with longstanding Board practice and this Court's approach in *Mt. Healthy*, as well as congressional approval of the Board's practice, the court of appeals declined to enforce the Board's order in this case on the ground that the *Wright Line* test improperly allocates the burden of proof between the Board's General Counsel and

the employer in dual motive cases. In the court of appeals' view, once the General Counsel has shown that an employee's protected activity was a motivating factor in an employer's decision to discipline or discharge the employee, the employer should bear only the burden of *production* of evidence that legitimate factors motivated its decision, not the burden of *persuasion* that those factors in themselves would have resulted in the discipline or discharge. 662 F.2d at 904. In the court's view, it is the General Counsel's burden to show not only that an improper consideration motivated the discipline or discharge, but also that the adverse action would not have occurred for other reasons in the absence of any protected activities. In so holding, the court improperly rejected the Board's consistent practice and disregarded Congress's approval of that practice. Moreover, the court appears to have misunderstood the manner in which the *Wright Line* test operates. That test is fully consistent with the decisions of this Court, applicable statutes and regulations, and traditional principles of proof.

A. The Court of Appeals Improperly Disregarded Congress's Approval of the Board's Consistent Holdings Under The Wagner Act That Discipline Motivated Even in Part by Unlawful Considerations Violated Section 8(a)(3) Unless the Employer Could Show That It Would Have Taken the Same Action in the Absence of the Impermissible Motivation

The court of appeals, in rejecting the Board's allocation of burdens of proof in *Wright Line*, improperly disregarded the fact that in 1947 Congress expressly rejected an effort to change the Board's practice in dual motive cases. The practice approved by Congress was essentially the same as that rejected by the court of appeals.

1. Soon after the enactment of the Wagner Act in 1935, the Board developed a consistent standard of proof for Section 8(a)(3) cases.[6] The Board held that where "a

[6] Section 8(3), the relevant section of the 1935 Act, is in all material respects identical to Section 8(a)(3) of the present Act. Therefore, we shall refer to the provision by its current designation.

substantial motive for the discharg[e] was the [employer's] desire to thwart the nascent Union[, a] violation is * * * established whether or not the [employer] may have had some other motive in addition * * *." *Dow Chemical Co.*, 13 N.L.R.B. 993, 1023 (1939), enforced in relevant part, 117 F.2d 455 (6th Cir. 1941). The Board, with court approval, adhered to this rule throughout the period prior to the 1947 enactment of the Taft-Hartley amendments (Labor Management Relations Act, ch. 120, 61 Stat. 136).[7]

At the same time, the Board, again with court approval, decided that an employer whose action was motivated in part by unlawful considerations should be given the opportunity to avoid liability under Section 8(a)(3) if it could show that it would have taken the same action in the absence of the impermissible motive. However, the Board made it clear that in such cases the burden of

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[7] See, e.g., *Republic Creosoting Co.*, 19 N.L.R.B. 267, 294 (1940) (violation found even though "other reasons, having no relation to [employee's] union membership or activity, apparently entered into the respondents' decision"); *United Dredging Co.*, 30 N.L.R.B. 739, 766 n.24 (1941) (discharges at issue "would be unlawful even if there were, in addition to a desire to discourage union membership, other motives"); *Lone Star Gas Co.*, 52 N.L.R.B. 1058, 1060 (1943) (violation found since protected activity was "at least one of the motivating causes of [employee's] discharge"); *John W. Campbell, Inc.*, 58 N.L.R.B. 1153, 1162-1163 (1944) ("Since, as the respondent's defense disclosed, it discharged the aforesaid three employees because they engaged in union activities protected under the Act, it is beside the point to show that, as the respondent further asserts, an additional [lawful] consideration * * * also lent weight to its decision."); *Carl L. Norden, Inc.*, 62 N.L.R.B. 828, 831 n.12 (1945) ("so long as one of the grounds for the discharge was discriminatory, it is immaterial that additional considerations may have lent weight to the respondent's decision to discharge [the employee]"). See also *Cupples Co. Manufacturers* v. *NLRB*, 106 F.2d 100, 117 (8th Cir. 1939) (violation found where the employee's "joining the union was at least a contributing cause of his discharge"); *Kansas City Power & Light Co.* v. *NLRB*, 111 F.2d 340, 348-349 (8th Cir. 1940) (transfer unlawful where "at least one purpose * * * was to affect and interfere with labor activities").

persuasion for that showing was on the employer, which was in the best position to separate the effects of legal and illegal motives. As the Board explained in a case involving a charge of discriminatory denial of reemployment:

> In claiming * * * that certain factors were present which would have precluded some employees from reemployment even in the absence of the illegal condition, the [employer] must assume the burden of "disentangling the consequences for which it was chargeable from those from which it was immune." * * * The question is * * * whether the [employer] would have refused employment to these employees entirely apart from the improper practices which we have found were committed. Where two motives for [an action] may have existed, one clearly improper and one a just cause for severance of the employer-employee relationship, and where the improper motive is found to have been present in general, we must require the [employer] to adduce clear and convincing proof that the [adverse action would have been taken] for proper cause entirely apart from illegal considerations.

Eagle-Picher Mining & Smelting Co., 16 N.L.R.B. 727, 801 (1939) (footnote omitted), enforced in relevant part, 119 F.2d 903 (8th Cir. 1941), quoting *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir.), cert. denied, 304 U.S. 576 (1938).[8]

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[8] See also *Kelly-Springfield Tire Co.*, 6 N.L.R.B. 325, 342 (1938) ("[p]roof of the presence of proper causes at the time of discharge" is "not conclusive" in the absence of a showing by the employer that "such causes in fact induced the discharge"); *Borden Mills, Inc.*, 13 N.L.R.B. 459, 474-475 (1939) (suggesting that it may "constitute a defense to the unfair [labor] practice alleged to prove that the discharge would have taken place without consideration of the [impermissible] cause"); *Salmon & Cowin, Inc.*, 57 N.L.R.B. 845, 846 n.1 (1944) (violation found "in the absence of a showing by the respondent that [the lawful reason] alone would have induced it to deny [the employee] reinstatement"), enforced, 148 F.2d 941 (5th Cir.), cert. denied, 326 U.S. 758 (1945); *Phillip*

2. In 1947 Congress adopted the Taft-Hartley amendments, which substantially revised the Wagner Act in various respects. At that time Congress was aware of the Board's consistent position that employer action motivated even in part by unlawful considerations violated Section 8(a)(3) of the Act unless the employer could prove that it would have taken the same action absent those considerations. Congress considered and specifically rejected a provision that would have overruled the Board's practice in such cases.

Vandernoot, 64 N.L.R.B. 529, 537 (1945) (footnote omitted) ("[W]e * * * have here two causes, one legal, the other illegal. But unless [the employee] would have been discharged absent the illegal motivation, responsibility remains, and the burden was on the [employer] to disentangle the legal from the illegal."); *Wright-Hibbard Industrial Electric Truck Co.*, 67 N.L.R.B. 897, 908 n.15 (1946) ("This is not to be construed as a finding that the respondent might not have been under the imminent, or then present, necessity of reducing its force and that some employees, absent discrimination, would not have been laid off or discharged. By its general discrimination, however, it has placed itself in a position where it must bear the consequences of such action, for 'it rested upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune,'" quoting *NLRB* v. *Remington Rand, supra*); *Robbins Tire & Rubber Co.*, 69 N.L.R.B. 440, 454 n.21 (1946) (employer required to "show that the discharges would have in any event taken place absent the illegal motivation"), enforced, 161 F.2d 798 (5th Cir. 1947); compare *Mallinckrodt Chemical Works*, 63 N.L.R.B. 373, 388 (1945) ("Since there is no showing that the [union] affiliation of any of the [employees] was a factor in bringing about the discharges[,] * * * [the employer] is not required to justify either the discharges or its procedure in connection therewith"). The courts of appeals also found it appropriate to require the employer to prove that it had acted for legitimate reasons in such cases. See, e.g., *NLRB* v. *Remington Rand, supra*, 94 F.2d at 871-872; *NLRB* v. *Kentucky Fire Brick Co.*, 99 F.2d 89, 92-93 (6th Cir. 1938); *NLRB* v. *Stackpole Carbon Co.*, 105 F.2d 167, 176 (3d Cir.), cert. denied, 308 U.S. 605 (1939); *NLRB* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941); *NLRB* v. *Barrett Co.*, 135 F.2d 959, 961-962 (7th Cir. 1943); cf. *Martel Mills Corp.* v. *NLRB*, 114 F.2d 624, 632 (4th Cir. 1940); *Montgomery Ward & Co.* v. *NLRB*, 107 F.2d 555, 560 (7th Cir. 1939).

During the hearings on proposed amendments to the Wagner Act, industry representatives criticized the Board's practice in discriminatory discharge cases on the ground that the Board had found violations of the Act "[e]ven when the Board admits that an employee was guilty of misconduct justifying discharge."[9] In response to this criticism, the House Labor Committee proposed an amendment to Section 10(c) of the Act that would have required the Board to base its decisions upon the "weight of the evidence" (instead of "all the testimony taken") and would have precluded it from granting reinstatement or backpay to a discharged or suspended employee "unless the weight of the evidence shows that the individual was not suspended or discharged for cause." H.R. Rep. No. 245, 80th Cong., 1st Sess. 42, 58 (1947).[10] Dissenting

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[9] See *Amendments to the National Labor Relations Act: Hearings on H.R. 8, H.R. 725, H.R. 880, H.R. 1095, and H.R. 1096 Before the House Comm. on Education and Labor*, 80th Cong., 1st Sess. 2723 (1947) (statement of Theodore R. Iserman).

The Board's policy proscribing discipline motivated either "wholly or in part" by impermissible considerations had already been brought to the attention of Congress through the Board's Annual Reports. 5 *NLRB Annual Report* 37-38 & n.39 (1941) (citing *Dow Chemical Co., supra*, among other cases); see also 3 *NLRB Annual Report* 65 (1939); 4 *NLRB Annual Report* 60 (1940); 6 *NLRB Annual Report* 45 (1942); 7 *NLRB Annual Report* 46 (1943). Compare *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 187 n.20 (1981); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203 (May 3, 1982), slip op. 28 n.66.

[10] At several points the House committee (H.R. Rep. No. 245, *supra*, at 20, 41) referred to T. Iserman, *Industrial Peace and the Wagner Act* (1947). The Iserman volume (at pages 74-75) recommended:

> The Act * * * either should forbid the Board to reinstate an employee guilty of violating shop rules or for other misconduct or should state, in terms the Board would understand and have to follow, that when an employer shows proper grounds for discharging or otherwise disciplining an employee or for denying advancement to him, the Board shall not find that the em-

members of the House committee challenged the proposed amendment. They asserted that, if "weight of the evidence" meant more than "a preponderance of evidence," this would "hinder the prevention of unfair labor practices by rendering the proof of such practices more difficult." H.R. Rep. No. 245, *supra*, at 91. They noted also that the second change would require the Board "to find on 'the weight of the evidence' not only that the discharge was in violation of the [A]ct but also that the discharge was not for cause" (*id.* at 92). The dissenters contended that this change would "permit an employer to escape liability for having discharged an employee for his union activities merely if grounds existed which would justify the employee's discharge" and would therefore "render a nullity the protection afforded workers by the [Act] against discrimination because of union activities" (*id.* at 92-93).

Congress ultimately rejected the House effort to change the Board's practice. The conference committee modified the House amendment by deleting the phrase "[i]f upon the weight of the evidence" and substituting "[i]f upon the preponderance of the testimony taken." It revised the remedial limitation to state simply that the Board could not order relief for an employee who had been suspended or discharged "if such individual was suspended or discharged for cause." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 13 (1947). These amendments to Section 10(c) were enacted by Congress, and the language remains in force today. See 29 U.S.C. 160(c).

Senator Taft, the Senate sponsor and floor manager of the Taft-Hartley amendments and a member of the conference committee, explained that the purpose of the conference amendment was to reaffirm the Board's existing practice under which, once the Board had shown an impermissible motive, the employer was to bear the bur-

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ployer * * * discriminated against the employee for a purpose that Section 8(3) prohibits, except upon clear and direct evidence that the purpose was one that the Act forbids.

den of proving that it would have taken the same action for lawful reasons:

> The House language provided that the burden of proof should be on the employee to show that he was not discharged for cause. The Senate conferees took the position that the question was whether he was discharged for cause, and that the burden of proving that cause should be on the employer, because the information is in his hands. So we did not accept the House provision. All this language does is simply to say exactly what the present rule is. * * *
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> [T]here is no intention whatever to change the existing law on this particular question.
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> The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board.

93 Cong. Rec. 6518-6519 (1947). Senator Ball, another member of the conference committee, stated that under the conference amendment finding of an unfair labor practice would be warranted under Section 10(c) unless "the employer proves to the satisfaction of the Board that he discharged an employee for cause * * *. That is exactly the rule which the courts now require the * * * Board to follow." *Id.* at 7529.

The statements of Senators Taft and Ball demonstrate that, contrary to the view of the court below (*NLRB* v. *Wright Line*, *supra*, 662 F.2d at 904 n.8), the legislative history is not "inconclusive on the question of burden of proof," and that that question was addressed not "only

in the 'preponderance' language of * * * section 10(c)," but also in the limitation on remedial relief for employees discharged for cause. The statements of Senator Taft in particular could hardly be more plain: He understood the Board's rule to place the burden of proof on the employer who is shown to have relied on unlawful considerations, and he intended that aspect of the rule—the precise aspect of the *Wright Line* test that was rejected by the court of appeals—to continue in force. Those statements are entitled to particular weight. See *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 14 ("remarks * * * of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction"); *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964).[11]

Thus, in 1947, Congress specifically approved the allocation of burdens of proof reflected in the Board's stand-

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[11] The statement of the House Managers that accompanies the conference bill is not to the contrary. See H.R. Rep. No. 510, *supra*, at 55. The statement explains the House Managers' view that the Board could find a violation only upon a "preponderance of the evidence" and that an employee shown to be discharged for cause was not to be afforded a statutory remedy, whether or not he was also engaged in union activities. However, nothing in this statement reflects disagreement with the views of Senators Taft and Ball that, once the Board has shown by a preponderance of evidence that the employer was motivated at least in part by unlawful considerations, "the employer has to make the proof" "to the satisfaction of the Board" that it would, in any event, have discharged the employee for good cause.

Little weight should be given to the remarks of Senator Pepper, who asserted in a colloquy with Senator Taft that the amendments to Section 10(c) would require a change in Board practice. See 93 Cong. Rec. 6518-6519. As this Court has noted, the views of the opponents of legislation are not an authoritative guide to its construction. *NLRB* v. *Fruit Packers*, *supra*, 377 U.S. at 66. As noted in the text, *supra*, Senator Taft, a sponsor of the amendments and a member of the conference committee, specifically rejected Senator Pepper's remarks and explained that the amendments reaffirmed the Board's existing practice of requiring the employer to bear the burden of proving that it would have taken the same action in any event.

ard, under which, once an impermissible motive was shown, an employer was afforded an opportunity to prove that it had acted for lawful reasons. As this Court has recently stressed, the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, "especially where Congress has refused to alter the administrative construction." *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 177 (1981), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See also *North Haven Board of Education* v. *Bell, supra*, slip op. 16, quoting *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974) (The "deletion of a provision by a Conference Committee 'militates against a judgment that Congress intended a result that it expressly declined to enact.'"). The court below accordingly erred in disregarding Congress's approval of the Board's practice. By mandating a different standard, under which the General Counsel must prove that the employee's protected activity was the "but for" cause of the disciplinary action, the court of appeals has "adopt[ed] by judicial fiat an interpretation that Congress specifically rejected when it enacted the 1947 amendments to the NLRA" (*Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Association*, No. 80-1045 (June 24, 1982), slip op. 17).

B. The Board's Allocation of Burdens of Proof Is Consistent With the Decisions of This Court, With Applicable Statutes and Regulations, and With Accepted Principles of Proof

Despite congressional approval of the Board's practice in dual motive Section 8(a)(3) cases, the court of appeals rejected the Board's *Wright Line* formulation of the allocation of burden of proof as contrary to the Board's statutory and regulatory authority and inconsistent with traditional principles of proof. The court also appears to have believed that the Board should have looked not to

Mt. Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 (1977), but rather to *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), as a model for allocation of burden of proof in Section 8(a)(3) cases. None of these grounds justifies the court's rejection of the Board's *Wright Line* test.

1. After Congress enacted the Taft-Hartley amendments, the Board adhered to its view that discipline "motivated in part by discriminatory reasons is unlawful, even if it may otherwise be motivated by lawful reasons." *Film Inspection Service, Inc.*, 144 N.L.R.B. 1040, 1042 & n.5 (1963) (collecting cases); and see *Wright Line*, *supra*, 251 N.L.R.B. at 1084 (collecting cases).[12] The Board also continued to permit an employer who had been motivated by both lawful and unlawful considerations to avoid liability if it succeeded in "disentangling the consequences" of its wrongdoing. See *Bedford Cut Stone Co.*, 235 N.L.R.B. 629, 629 (1978); *Klate Holt Co.*, 161 N.L.R.B. 1606, 1612 (1966). The Board's "in part" test continued to receive the approval of many courts of appeals, although the words used to describe the test varied from court to court.[13] In recent years, some courts, led by

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[12] Soon after passage of the Taft-Hartley amendments, the Board analyzed the legislative history of the amendments and expressly rejected arguments that Congress had intended to change the Board's policy of requiring an employer whose unlawful motivation had been proven to "establish * * * that the discharges were not discriminatory but for cause." *Sioux City Brewing Co.*, 82 N.L.R.B. 1061, 1064 & n.11 (1949); *Standard Service Bureau*, 87 N.L.R.B. 1405, 1407 & n.5 (1949).

[13] See, e.g., *NLRB* v. *Great Eastern Color Lithographic Corp.*, 309 F.2d 352, 355 (2d Cir. 1962), cert. denied, 373 U.S. 950 (1963); *Edgewood Nursing Center, Inc.* v. *NLRB*, 581 F.2d 363, 368 (3d Cir. 1978); *Neptune Water Meter Co.* v. *NLRB*, 551 F.2d 568, 569 (4th Cir. 1977); *NLRB* v. *Big Three Industries, Inc.*, 497 F.2d 43, 49 (5th Cir. 1974); *NLRB* v. *West Side Carpet Cleaning Co.*, 329 F.2d 758, 761 (6th Cir. 1964); *Singer Co.* v. *NLRB*, 429 F.2d 172, 179 (8th Cir. 1970); *NLRB* v. *Ayer Lar Sanitarium*, 436 F.2d 45, 50 (9th Cir. 1970); *M.S.P. Industries, Inc.* v. *NLRB*, 568 F.2d 166, 173-174 (10th Cir. 1977); *Allen* v. *NLRB*, 561 F.2d 976, 982 (D.C. Cir. 1977); compare

the First Circuit,[14] became increasingly critical of the "in part" test, concluding that the test "ignores the legitimate business motive of the employer and places the union activist in an almost impregnable position once union animus has been established" (*Wright Line, supra*, 251 N.L.R.B. at 1084).

In response to the confusion that had developed, the Board formulated its *Wright Line* test in an effort to describe more clearly its standard for proof of discrimination in Section 8(a)(3) cases. The Board looked for guidance to this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which involved the closely analogous issue of action taken against a public employee based on dual motives. In *Mt. Healthy*, the school board had denied tenure to a public school teacher for two stated reasons, one of which was that he had engaged in conduct protected by the First Amendment. The Court held that the employee could establish a claim to reinstatement if he was denied tenure on the ground that he had engaged in such constitutionally protected conduct. *Id.* at 283-284. However, the other reason stated by the school board was clearly a legitimate ground for denial of tenure. The question was whether reinstatement could be required under the circumstances. The court rejected a "rule of causation which focuses solely on whether protected con-

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NLRB v. *Whitin Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953) (approving "in part" test but suggesting that violation was proved only if "the union activity weighed more heavily in the decision" than the legitimate reason).

[14] See, e.g., *NLRB* v. *Billen Shoe Co.*, 397 F.2d 801, 803 (1st Cir. 1968) (when good cause for discharge appears, the burden is on the Board "to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one"); *NLRB* v. *Fibers Int'l Corp.*, 439 F.2d 1311, 1312 (1st Cir. 1971) ("Board has the burden of * * * showing that the employer's dominant motive was not a proper business one, but union animus"); *Coletti's Furniture, Inc.* v. *N.L.R.B.*, 550 F.2d 1292, 1293-1294 (1st Cir. 1977) ("[w]here there are both proper and allegedly improper

duct played a part, 'substantial' or otherwise" in the employer's decision.[15] *Id.* at 285. It ruled that the burden of proof should be allocated as follows (*id.* at 287; emphasis added; footnote omitted):

> Initially, * * * the burden was properly placed upon [the employee] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the [School] Board *had shown by a preponderance of the evidence* that it would have reached the same decision

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grounds for discharge, [the Board's] burden is to find affirmatively that the discharge would not have occurred but for the improper reason"). See also *Wright Line*, *supra*, 251 N.L.R.B. at 1084-1086 (collecting cases).

[15] The Court explained (429 U.S. at 285-286) that such a rule

> could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with [a "partial motive" test] is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Thus, the Court addressed concerns similar to those voiced by the First Circuit and the other courts that have criticized the "in part" test used by the Board in dual motive Section 8(a)(3) cases.

> as to [the employee's] reemployment even in the absence of the protected conduct.

See also *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 270-271 n.21 (1977); *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 416-417 (1979).

The Board, in its *Wright Line* decision, reformulated its test for Section 8(a)(3) cases in similar terms after concluding that the two-step procedure established by the Court in *Mt. Healthy* would "maintain a substantive consistency with existing Board precedent and [also] accommodate the concerns expressed by critics of the ['partial motive' test]" (251 N.L.R.B. at 1083). Thus, under the *Wright Line* test, once the General Counsel demonstrates that the employer's opposition to protected activity was a "motivating factor" in a disciplinary decision, the employer can still avoid liability if it proves by a preponderance of the evidence that it would have taken the same action even in the absence of the unlawful motive (*id.* at 1089).[16] The Board noted that this reformulation did not constitute a repudiation of the "well-established principles and concepts" the Board had applied in the past, but that the *Mt. Healthy* test embodied a "more precise and formalized framework for making this analysis" and therefore would clarify the Board's decisional processes in a manner consistent with the objectives of the Act (*ibid.*).

Given the similarity between a *Mt. Healthy* case and a dual motive Section 8(a)(3) case, it was reasonable for

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[16] Of course, the General Counsel may prove, as part of his prima facie case, or otherwise, that the employer's asserted reason for its action is a pretext. See *Wright Line*, *supra*, 251 N.L.R.B. at 1088 n.12; *Limestone Apparel Corp.*, 255 N.L.R.B. 722 (1981). In such cases, it is clear, without more, that the employer has not sustained its burden of proving that it would have acted for the asserted reason even absent its unlawful motivation, since the General Counsel has established that the employer had only an unlawful motive. See *NLRB* v. *Charles Batchelder Co.*, 646 F.2d 33, 43 (2d Cir. 1981) (Newman, J., concurring).

the Board to conclude that "the *Mt. Healthy* procedure * * * serv[es] to effectuate the policies and objectives of Section 8(a)(3)" (*Wright Line, supra*, 251 N.L.R.B. at 1088-1089). As the Board explained (*id.* at 1089):

> Under the *Mt. Healthy* test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided with a formal framework within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof." Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because its action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

The court below thought *Mt. Healthy* inapposite because in that case the employer had conceded that its action was prompted partly by the employee's protected activity, while here respondent denied any such motivation. See *NLRB* v. *Wright Line, supra*, 662 F.2d at 906. But the court suggested no reason for distinguishing between a finding of an improper motivating factor based on an employer's admission and a finding based on the General Counsel's showing by a preponderance of the evidence. This Court has indicated that the *Mt. Healthy* approach to shifting the burden of proof is applicable to a case involving contested motivation. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra*, 429 U.S. at 270-271 n.21.[17]

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[17] Amicus Curiae Council on Labor Law Equality, on the other hand, agrees that *Mt. Healthy* is apposite but contends (Br. Urging Review 10-11) that it imposes on an employee seeking to establish

2. The court of appeals also concluded that the Board's adoption of the *Mt. Healthy* formulation for Section 8(a)(3) cases was improper because it was outside the Board's statutory authority insofar as it assigned to an employer shown to have discharged an employee at least in part because of his protected activity a "burden of persuasion" (i.e., a burden of showing by a preponderance of the evidence that it would have taken the same action absent the employee's protected activity), rather than merely a "burden of production" (i.e., a burden of coming forward with enough "evidence to balance, not to outweigh, the evidence produced by the general counsel"). *NLRB* v. *Wright Line*, *supra*, 662 F.2d at 904-905. The court believed that assigning any greater burden to the employer would conflict with the requirement in Section 10(c) of the Act, 29 U.S.C. 160(c), that the Board is to find an unfair labor practice "upon the preponderance of the testimony." *Id.* at 904. See also Pet. App. 3a, 4a-6a (concurring opinion). Accord: *Behring International, Inc.* v. *NLRB*, 675 F.2d 83, 86-90 (3d Cir. 1982), petition for cert. pending, No. 82-438 (filed Sept. 13, 1982).[18]

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that he was discriminated against the burden of proving, not only that the employer had an unlawful motive, but that it was the "dominant motive" for the action. However, the Court's opinion in *Mt. Healthy* clearly shows that the Court rejected a "rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision" (*Mt. Healthy*, *supra*, 429 U.S. at 285; see also *Village of Arlington Heights*, *supra*, 429 U.S. at 265) and instead ruled that, once the employee has established that his protected activity was a "motivating factor" in the employer's decision, the burden then shifts to the employer to show "by a preponderance of the evidence that it would have reached the same decision * * * even in the absence of the protected conduct" (*Mt. Healthy*, *supra*, 429 U.S. at 287).

[18] While the First and Third Circuits have rejected the Board's *Wright Line* allocation of the burden of proof in dual motive Section 8(a)(3) cases, the Eighth and Ninth Circuits have specifically approved that allocation. See *NLRB* v. *Fixtures Mfg. Corp.*, 669 F.2d 547, 550 n.4 (8th Cir. 1982); *Zurn Industries, Inc.* v. *NLRB*, 680

The court's rejection of the Board's *Wright Line* allocation of the burden of proof appears to be based on a misunderstanding of *Wright Line*. The court mistakenly believed that the *Wright Line* approach results in shifting to the employer the ultimate burden of proving facts sufficient to show the existence or non-existence of an unfair labor practice. See 662 F.2d at 905. However, the Board stressed in *Wright Line* that its formulation "does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence" and "does not shift the ultimate burden." 251 N.L.R.B. at 1088 n.11. The court below also appeared to believe that under the Board's formulation there would be insufficient consideration of the employer's "good" reasons as well as the General Counsel's evidence of improper motive. See 662 F.2d at 907. However, the Board in *Wright Line* described its goal to be to analyze "thoroughly and completely the justification presented by the employer." 251 N.L.R.B. at 1089.

At bottom, the court's conclusion appears to be grounded on an erroneous view of the nature of the "prima facie"

F.2d 683, 686-693 (9th Cir. 1982). The Sixth and Tenth Circuits have acknowledged the conflict, but have declined to rule on the issue. See *NLRB* v. *Carbonex Coal Co.*, 679 F.2d 200, 203-204 (10th Cir. 1982); *NLRB* v. *Comgeneral Corp.*, 684 F.2d 367, 369-370 (6th Cir. 1982); but see *Republic Die and Tool Co.* v. *NLRB*, 680 F.2d 463, 464-465 (6th Cir. 1982) (suggesting that the court had "accepted the Board's burden shifting formula as proper" in "numerous decisions"). While the Seventh Circuit appeared to accept the Board's *Wright Line* decision (see *Peavey Co.* v. *NLRB*, 648 F.2d 460, 461 (1981); *Justak Brothers and Co.* v. *NLRB*, 664 F.2d 1074, 1077 (1981)), that court has recently agreed with the position of the First and Third Circuits (see *NLRB* v. *Webb Ford, Inc.*, 689 F.2d 733, 739 (1982)). The Second Circuit, while not as yet ruling on the validity of the *Wright Line* test in a Board case (see *NLRB* v. *Charles Batchelder Co.*, 646 F.2d 33, 38-39 (1981)), has approved that test in a case of employee discrimination under the Energy Reorganization Act, 42 U.S.C. (Supp. IV) 5851 (see *Consolidated Edison Co. of New York, Inc.* v. *Donovan*, 673 F.2d 61 (1982)).

case established by the General Counsel before the employer is even faced with the opportunity to present an affirmative defense based on permissible motives. In the court's view, the General Counsel's prima facie case "creates a kind of presumption that an unfair labor practice has been committed," which the employer may be required to rebut by producing evidence of a "good" reason for the discharge. 662 F.2d at 905. According to the court, "the Board apparently feels that the Act is violated by a showing of anti-union sentiment in connection with a discharge." *Id.* at 906 n.12.

Under the Board's practice, however, the General Counsel's prima facie case consists of much more than the court suggests. The General Counsel must prove by a preponderance of the evidence that the employee's protected activity was *in fact* a motivating factor in the employer's disciplinary decision. Thus, in the present case the Board found that the General Counsel had proved that respondent, upon learning that a union drive was afoot, mounted an "extensive campaign" of interrogating employees and thereby determined that Santillo was "one of the prime organizers" (Pet. App. 19a-20a, 23a, 35a); that respondent displayed a "strong union animus" by this and other unlawful conduct (*id.* at 11a-12a, 33a-35a); that respondent's area manager explicitly threatened, among other things, to "get even" with Santillo for his union activism (*id.* at 20a, 33a); that Santillo was abruptly fired the first working day after that threat (*id.* at 24a-25a); and that the area manager, after discussing Santillo's union support with respondent's president, refused to put in writing the asserted reasons for the discharge (*ibid.*). Such proof goes well beyond a mere "showing of anti-union sentiment in connection with [Santillo's] discharge" (*NLRB* v. *Wright Line*, *supra*, 662 F.2d at 906 n.12); rather, as the Board concluded (Pet. App. 12a), it is "strong and credible evidence" that respondent's union animus was a "motivating factor" in the discharge decision. See also *Heartland Food Warehouse, Division of Purity Supreme Supermarkets*, 256

N.L.R.B. 940, 940 (1981) (finding that General Counsel had established that protected activities were factors in selection of employees for discharge), enforcement denied, 685 F.2d 421 (1st Cir. 1982), petition for cert. pending, No. 82-736 (filed October 28, 1982).[19]

Thus, the General Counsel must make out a prima facie case, not with some minimal showing aided by a presumption, but by proving by a preponderance of the evidence that the employee's protected activity was a motivation for the employer's disciplinary action.[20] That

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[19] Board decisions show that mere "speculation" or "suspicion" premised on the discipline of an employee who engaged in protected activity is not enough to establish the presence of an unlawful motivating factor. See, e.g., *McCormick & Co.*, 254 N.L.R.B. 922, 923 (1981); cf. *Bay State Gas Co.*, 255 N.L.R.B. 708, 709 (1981). The Board requires direct or circumstantial evidence demonstrating the employer's knowledge of, and hostility to, the employee's protected activity before it will sustain the General Counsel's case. See, e.g., *Wolf Street Supermarkets, Inc.*, 264 N.L.R.B. No. 150 (Sept. 30, 1982), slip op. at 3 n.2, ALJD at 16 (General Counsel did not establish prima facie case of discriminatory refusal to rehire by adducing proof that employer failed to interview apparently qualified applicants from a shop that the employer knew to be unionized, while simultaneously interviewing other candidates, in absence of showing of union animus or other unlawful reason for the discriminatory conduct); *Electron Tube Division of Litton Systems, Inc.*, 260 N.L.R.B. No. 149, slip op. at 1-2 n.1 (Mar. 24, 1982) (coincidence of earlier discipline with organizing campaign insufficient to establish unlawful motivation in absence of union animus or other unfair labor practices by the employer); *Emory Nursing Home, Inc.*, 260 N.L.R.B. No. 71, ALJD at 5 (Feb. 26, 1982) (although the General Counsel proved "animus" and "suspicio[us]" timing of discharge, no prima facie case in absence of credible evidence that employer interrogated employee or was aware of her union activity); *United Broadcasting Co.*, 253 N.L.R.B. 697, 697 n.1 (1980) (no prima facie case where there was no showing of animus and little evidence of dischargee's involvement in protected activity); *Mineola Ford Sales, Ltd.*, 258 N.L.R.B. 406, 410 & n.3 (1981) (General Counsel did not establish prima facie case where employer was aware of union activity for many months before discharge); *Marriott Corp.*, 251 N.L.R.B. 1355, 1360 (1980) (no showing of anti-union motivation).

[20] The Board's *Wright Line* decision refers to the prima facie showing as consisting of evidence "sufficient to support the infer-

showing, without more, is sufficient to establish an unfair labor practice under Section 8(a)(3). Only after the General Counsel makes such a showing does the Board afford the employer the opportunity to avoid liability by demonstrating that some other legitimate motive would have led it to take the action in the absence of the protected activity.[21]

The burden that is shifted to the employer after the General Counsel has made his case is not a burden of proving itself innocent of the charge, as the court below seemed to believe. Rather, once the General Counsel has proved by a preponderance of the evidence that protected activity was a motivating factor in the employer's decision, thus establishing facts sufficient to constitute a violation, the employer is afforded the opportunity to show that, although it was motivated in part by the protected activity, it would have taken the same action for

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ence" that protected activity was a motivating factor in the employer's decision. 251 N.L.R.B. at 1089. Use of the term "inference" does not suggest that the General Counsel's burden of proof is less than it would be in any other type of case. In many cases before the Board, the evidence is largely circumstantial, and the Board's ultimate finding therefore necessarily rests on inference from the proven facts. See *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 48-50 (1954).

[21] There is no merit to the suggestion of the Third Circuit, in *Behring International, Inc.* v. *NLRB*, *supra*, 675 F.2d at 86, 88, that, under *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667 (1961), the Act is violated only if an unlawful motive for the challenged discipline "outweighs" any legitimate motive, and hence constitutes the "true" or "real" purpose behind the employer's action. The cases cited do not address the problem of determining the legality of discipline motivated by both lawful and unlawful considerations, but deal only with the very different problem of determining whether an assertedly lawful ground is merely a pretext (see page 12 n.5, *supra*). Moreover, this Court has explicitly rejected a test that turns on whether unlawful factors "outweigh" lawful ones. See *Mt. Healthy* v. *Doyle*, *supra*, 429 U.S. at 285-286; *Village of Arlington Heights*, *supra*, 429 U.S. at 265. Under those decisions, a plaintiff is entitled to a remedy for damages he would not have suffered but for the defendant's improper motivation.

legitimate reasons, in the absence of the protected activity. Since the General Counsel has proved by a preponderance of the evidence that improper motivation played a role in the employer's decision, and thus has effectively shown that a statutory violation occurred, the employer that elects to offer this affirmative defense in order to avoid liability must show by a preponderance of the evidence that its wrongful motivation was harmless because the same result would have followed in the absence of the proven improper motivation.

The Court below suggested that the employer is required only to rebut the evidence presented by the General Counsel, not to offer an affirmative defense. 662 F.2d at 905 n.9. This confuses two different situations. It is always open to the employer to attempt to discredit the evidence adduced by the General Counsel, and, if it succeeds, the General Counsel has not shown by a preponderance of the evidence that protected activity was a motivating factor for the employer's decision. But, if the employer is unable to rebut the General Counsel's evidence, the General Counsel has established facts sufficient to constitute a violation; in that situation, the employer can avoid liability only by showing by a preponderance of the evidence that it would have taken the same action for legitimate reasons, in the absence of the protected activity. Mere production by the employer of "evidence of a good and sufficient motive for the discharge" (Pet. App. 5a), which is all the court of appeals would require, would not suffice. A showing that there was a good reason that *could* have accounted for the employer's decision simply is not enough to avoid liability based on the General Counsel's proof that the decision in fact was based, at least in part, on an unlawful reason.

The Board has not exceeded the bounds of its statutory and regulatory authority in allowing the employer the opportunity of establishing as a defense to liability that it would have taken the same action for legitimate reasons even in the absence of the protected activity. Under *Wright Line*, consistent with Section 10(c) of the

Act, the General Counsel must establish by a preponderance of the evidence a violation of Section 8(a)(3), i.e., he must establish that protected activity was a motivating factor in the employer's decision. Although Section 10(c) provides that the remedies of reinstatement and back pay shall not be available in the case of an employee who has been suspended or discharged for cause, it does not indicate that the General Counsel must disprove every alternative reason that is suggested by the employer in order to establish the existence of an unfair labor practice by the preponderance of the evidence. Even if the language of the statute created doubts, the 1947 legislative history makes clear that Congress intended under Section 10(c) to require the employer to prove that it would have taken the action for legitimate reasons in any event, once the General Counsel has established that protected activity was a motivating factor. See pages 17-22, *supra*.[23]

Contrary to the belief of the court of appeals, the *Wright Line* formulation is fully consistent with established principles of proof. The court cited a passage from *Wigmore on Evidence* concerning the distinction between

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[23] The court below also cited (662 F.2d at 903) Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), which states that, unless otherwise provided by statute, the proponent of an order shall bear the burden of proof, as well as a section of the Board's rules, 29 C.F.R. 101.10(b), that provides that the General Counsel bears the burden of proving an unfair labor practice. Neither of these provisions supports the court's conclusion. The Administrative Procedure Act on its face indicates that a more specific provision of the National Labor Relations Act will govern. As shown in the text, *supra*, Section 10(c) of the Act authorizes the Board's allocation of burdens of proof in dual motive Section 8(a)(3) cases. In addition, Board practice is fully consistent with the Board's regulation. As noted in the text, *supra*, in establishing, by a preponderance of the evidence, that an employee's protected activity was a motivating factor in the employer's decision to discharge or discipline, the General Counsel satisfies the burden of proving facts sufficient to establish an unfair labor practice. Only after this burden is met is the employer required to establish a defense in order to avoid liability.

the burden of rebutting a prima facie case and the burden of persuading the trier of fact on the ultimate issue in a case by a preponderance of the evidence. 662 F.2d at 905. Wigmore, quoting *Speas* v. *Merchants Bank & Trust Co.*, 188 N.C. 524, 529, 125 S.E. 398, 401 (1924), discusses a situation in which a proponent has produced sufficient evidence to create a legally mandatory, rebuttable presumption; in that situation, the prima facie case need not be overcome by a preponderance of the evidence, or by evidence of greater weight, but need only be balanced by some evidence worthy of credence. See 9 J. Wigmore, *Evidence* §§ 2487, 2494 (Chadbourn Rev. 1981). The principle described by Wigmore applies to the General Counsel's proof under *Wright Line*. If the General Counsel produces evidence sufficient to permit an inference that protected activity was a motivating factor in the employer's decision, the employer may rebut that evidence directly in an attempt to undermine the inference. If the employer succeeds in "balancing" the General Counsel's evidence, the General Counsel has failed to meet his burden of showing by a preponderance of the evidence that protected activity in fact was a motivating factor in the decision (see page 33, *supra*). This is because the burden of persuasion on that issue always remains with the General Counsel. However, if the employer fails to "balance" the evidence, the General Counsel has met his burden of persuasion and has established that an improper consideration in fact motivated the decision. At that point, the employer can escape liability only by establishing as an affirmative defense that its unlawful motive did not result in any harm, since it would have taken the same action in the absence of the unlawful motive. It is entirely consistent with established principles of proof for the burden of persuasion to rest with the employer to establish this affirmative defense. See, e.g., 9 *Wigmore*, *supra*, § 2485 at 287.[23]

[23] Fed. R. Evid. 301, also referred to by the court below (662 F.2d at 905), is concerned with the evidence necessary to rebut a presumption, not with the proof required to establish an affirmative de-

The test favored by the court of appeals would diminish substantially the protection the Act was intended to afford employees engaged in union or other concerted activity. Under the court of appeals' standard, even after the General Counsel has established by a preponderance of the evidence that opposition to the employee's protected activity was a motivating factor in the employer's disciplinary decision, the employer would be required to show merely that there was also a legitimate reason that *could* have caused the decision. At this point, the burden of showing that the employee was not in fact disciplined for the good reason would shift to the General Counsel (and the employee, whom he represents). In many cases, it would be difficult, if not impossible, to sustain this burden. Few employees are so perfect that an employer could not find some reason that *might* have warranted discipline of the employee.[24] Accordingly, unless

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fense once a violation has been effectively established by a preponderance of the evidence, which is the issue in this case.

[24] The Third Circuit's discussion of *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), suggests that it may believe that, under that decision, the employer is required only to articulate some legitimate reason for its action. See *Behring International, Inc.* v. *NLRB*, *supra*, 675 F.2d at 88-89. See pages 38-43, *infra*. *Burdine* requires the employer to go further and offer some evidence of a causal relationship between the legitimate reason and the employer's decision (450 U.S. at 254-255). However, even under this standard, the rule of the court below would leave the employee in an untenable position. For the production of some evidence of a legitimate reason for the employer's decision still does not prove that the employer would have made that decision for the legitimate reason in the absence of any protected activity. The employer is in the best position to make this additional proof, and it is only reasonable to require it to do so, since the General Counsel has already carried his burden of proving that discriminatory animus did in fact play a role in the employer's decision.

This Court, in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967) (emphasis in original), recognized that the employer is in a superior position to prove motivation by legitimate objectives:

> [I]f the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motiva-

the General Counsel could show that the lawful reason asserted by the employer was a pretext or was not a ground for disciplining other employees who had not engaged in protected activity, it is very likely that many employees who were disciplined for engaging in protected activity would be denied redress because of their inability to prove a negative (that they were not discharged for cause). Such a result would seriously chill the exercise of Section 7 rights by employees, by undermining the effectiveness of the statutory protection for exercise of those rights.

In contrast, an entirely proper burden is placed on the employer if it takes advantage of the opportunity to show by a preponderance of the evidence that it would have taken the same action for lawful reasons in any event. The evidence already establishes that the employer was motivated, at least in part, by unlawful considerations. At this point, requiring the employer—the proven wrongdoer—to prove an independently sufficient cause is only common sense. As Congress recognized (see pages 19-20, *supra*), the employer is in the best position to know, and thus to prove, whether it would have taken the same action even apart from the unlawful considerations.[35] The

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tion must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus * * * once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

[35] The Board's *Wright Line* test has provided employers with a meaningful opportunity to establish a defense. Under it, the Board has sustained disciplinary actions by employers even in cases in which the General Counsel has sucessfully demonstrated, or the employer has actually admitted, that it was motivated in part by hostility to protected activity. See, e.g., *Fieldcrest Mills, Inc.*, 264 N.L.R.B. No. 86, slip op. at 2 (Sept. 30, 1982) (while General Counsel had established an impermissible "motivating factor," the employer had shown that it would have discharged the employee in any

Board's approach thus properly accommodates the legitimate interests of all parties to a Section 8(a)(3) proceeding.

3. The court of appeals, in rejecting the Board's *Wright Line* test, also cited (662 F.2d at 907) *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), implying that *Wright Line* is inconsistent with *Burdine*. See also *Behring International, Inc.* v. *NLRB*, *supra*, 675 F.2d at 88-89, in which the Third Circuit cited *Burdine* in rejecting the Board's *Wright Line* test. We submit that the Board's *Wright Line* ap-

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event because of his infractions of company rules); *Pacific Intermountain Express Co.*, 264 N.L.R.B. No. 47, slip op. at 7-9 (Sept. 30, 1982) (employee deliberately disobeyed employer's instruction to return to work); *WNAC-TV Division, RKO General, Inc.*, 264 N.L.R.B. No. 31, ALJD at 11-17 (Sept. 28, 1982) (marginal performance as broadcast journalist); *Host Services, Inc.*, 263 N.L.R.B. No. 86, slip op. at 2-3 & n.3 (Aug. 24, 1982) (cursing supervisor without provocation); *Eaton Corp.*, 262 N.L.R.B. No. 18, ALJD at 20-21 (June 9, 1982) (employee made many mistakes and had received numerous written warnings); *Coil-ACC, Inc.*, 262 N.L.R.B. No. 12, ALJD at 9-12 (June 9, 1982) (driver had too many accidents); *Allied Eastern States Maintenance Corp.*, 261 N.L.R.B. No. 167, slip op. at 2, ALJD at 5-8 (May 28, 1982) ("long history of irritation" with employee's conduct justified discharge, notwithstanding admission that one reason for discharge was employee's advising other workers of "their union rights"); *Lafayette Steel Erector, Inc.*, 260 N.L.R.B. No. 160, ALJD at 4-5 & n.11 (Mar. 26, 1982) (bona fide reduction-in-force); *Eau Claire Press Co.*, 260 N.L.R.B. No. 148, ALJD at 8, 9-12 (Mar. 19, 1982) (employee violated rule requiring workers to secure own replacement when absent); *St. Joseph Hospital Corp.*, 260 N.L.R.B. No. 89, slip op. at 7-11 & n.13 (Mar. 8, 1982) (employee's leadership role in unprotected picketing justified suspension, notwithstanding admission that other protected activity was a "motivating factor" in suspension); *Parker Hannifin Corp.*, 259 N.L.R.B. 263, 266-267 (1981) (employee demonstrated growing propensity to leave work place during working time notwithstanding warnings); *Litton Mellonics Systems Division, a Division of Litton Systems, Inc.*, 258 N.L.R.B. 623, 625-626 (1981) (employer demonstrated substantial savings and other business advantages in relocation partly motivated by opposition to employees' protected activities).

proach is fully consistent with *Burdine*, which sets out the manner in which a plaintiff may prove intentional employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* In suggesting otherwise, the court below and the Third Circuit appear to have confused the elements of proof addressed in *Wright Line* and *Burdine*.

The ultimate proof the Title VII plaintiff must make under *Burdine* is similar to that made by the Board's General Counsel in a Section 8(a)(3) case. The Court in *Burdine* concluded that the Title VII plaintiff could make her ultimate proof by means of a three-step process. First, the plaintiff could make an initial showing simply that "she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." 450 U.S. at 253 (footnote omitted). See also *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973); compare *United States Postal Service Board of Governors* v. *Aikens*, No. 81-1044 (argued Nov. 9, 1982). That showing, or prima facie case, "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). Under *Burdine* the plaintiff's initial showing creates a "presumption" that the employer unlawfully discriminated against the employee.[26] 450 U.S. at 254. Once the plaintiff has made that initial showing, the employer must rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for its action, but is not required to "persuade the court that it was actually motivated by the proffered reasons." 450 U.S. at 254. If the employer raises a "genuine issue of fact" concerning whether it discriminated against the

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[26] No similar presumption of discriminatory motivation has been established in Board practice. See page 31, n.19, *supra*.

plaintiff (*id.* at 254-255), the plaintiff then must discharge his or her burden of persuasion and prove conclusively the employer's discriminatory motive.[27] This three-step shifting of burdens, which is intended to sharpen the inquiry into the question of discriminatory intent, leads finally to the "ultimate finding of fact" on that issue. *Furnco Construction Corp.* v. *Waters*, *supra*, 438 U.S. at 576; *Burdine*, *supra*, 450 U.S. at 256.

The showing made by the General Counsel in order to sustain his burden of proof under the *Wright Line* test is essentially the same as the Title VII plaintiff's conclusive proof of the ultimate finding of fact of the employer's discriminatory motive. In connection with this showing the Board has not provided specifically for the sort of intermediate shifts in burden of proof and production that are set out in *Burdine*. However, in order to meet his burden under *Wright Line*, i.e., to show that protected activity was a motivating factor in an employer's decision, the General Counsel must make a showing comparable to what the Title VII plaintiff ultimately proves at the completion of the third step of the *Burdine* inquiry.

Only after the General Counsel has proved the ultimate fact of discriminatory motive does *Wright Line* provide that the burden of persuasion shifts to the employer. This is a stage that the *Burdine* analysis does not even reach. To find a Title VII analogy to this part of the *Wright Line* test, it is necessary to examine Title VII cases that address the procedure to be used after a plaintiff establishes discrimination. In such cases, dealing with the appropriate remedy for the proven discrimination, the employer is required to assume the burden of proving that the action at issue would have been taken notwith-

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[27] The plaintiff can discharge his or her "ultimate" burden on motive "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256.

standing the unlawful discrimination.[28] See, e.g., *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772-773 & n.32 (1976) ("[n]o reason appears * * * why the victim rather than the perpetrator of the illegal act should bear the burden of proof" on the issue of whether the employer's proven discrimination, rather than the employee's job performance but for the discrimination, caused the failure to hire); *Teamsters* v. *United States*, 431 U.S. 324, 362 (1977) (same); *id.* at 369 n.53 (once nonapplicant presented information on qualifications, burden was on employer to show nonapplicant was not a victim of discrimination); *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 404 n.9 (1977) ("[e]ven assuming * * * that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event," citing, *inter alia*, *Mt. Healthy*).[29] Indeed, even if the employer can prove that

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[28] This Court has prescribed a similar allocation of burden of proof in a case involving allegations of unconstitutional racial discrimination in a non-employment context. In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 265-266, 270-271 n.21, the Court stated:

> When there is a proof that a discriminatory purpose has been a motivating factor in the [challenged] decision * * * judicial deference is no longer justified.
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> * * * * *
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> Proof that the decision * * * was motivated in part by a racially discriminatory purpose * * * shift[s] to the [decision-maker] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.

[29] Most courts of appeals in Title VII cases likewise have concluded that the defending employer should carry the burden of persuasion on the issue of independent causation, once discrimination has been proved. See, e.g., *Walker* v. *Ford Motor Co.*, 684 F.2d 1355, 1362 & n.9 (11th Cir. 1982); *Lee* v. *Russell County Board of Education*, 684 F.2d 769, 773-774 (11th Cir. 1982); *Muntin* v. *State of California Parks and Recreation Department*, 671

it would have taken the same action in the absence of the proven discrimination, the court in a Title VII case may impose a non-individual remedy, including injunctive relief and record-keeping or notification requirements. See, e.g., *Teamsters* v. *United States*, *supra*, 431 U.S. at 361; *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 751.[30]

F.2d 360, 363 (9th Cir. 1982); *Nanty* v. *Barrows Co.*, 660 F.2d 1327, 1333 (9th Cir. 1981); *League of United Latin American Citizens* v. *City of Salinas Fire Department*, 654 F.2d 557, 558-559 (9th Cir. 1981); see also *Williams* v. *Boorstin*, 663 F.2d 109, 117 (D.C. Cir. 1980); *Milton* v. *Weinberger*, 645 F.2d 1070, 1077 n.17 (D.C. Cir. 1981); *Bundy* v. *Jackson*, 641 F.2d 934, 951-953 (D.C. Cir. 1981).

Two court of appeals cases appear to conclude that the employee bears the burden of persuasion on the issue of independent causation in a Title VII case. See *De Anda* v. *St. Joseph Hospital*, 671 F.2d 850, 857 n.12 (5th Cir. 1982), and *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1019-1020 (1st Cir. 1979). In both cases, the courts apparently rely on the Court's brief statement in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976), that "no more is required to be shown than that race was a 'but for' cause," as opposed to the sole reason for rejection or discharge. The Court's abbreviated statement in *McDonald*, which was made before its decision in *Mt. Healthy*, did not indicate which party was to bear the burden of proof on the issue of independent causation. Following its decision in *Mt. Healthy*, the Court clarified the situation in *East Texas Motor Freight System* v. *Rodriguez*, *supra*, 431 U.S. at 404 n.9, in which it indicated that the *Mt. Healthy* approach to shifting burdens of proof should be applied in Title VII cases. See also *Teamsters* v. *United States*, *supra*, 431 U.S. at 362, 368, 369 n.53. Thus, *De Anda* and *Loeb* appear to be based on an incorrect reading of the Title VII cases.

[30] In this respect, the Board's *Wright Line* test treats employers in a dual motive Section 8(a)(3) case more favorably than they would be treated in a comparable dual motive Title VII case. In Title VII cases a court finds a violation even if proven discrimination is not found to have affected individual employment decisions; the effect of legitimate motives on individual decisions may affect the award of individual relief, but not the finding of a violation and

The court below and the Third Circuit appear to have believed that the burden of proof imposed on the General Counsel under *Wright Line* is analogous to the initial showing made by the Title VII plaintiff as the first step of the *Burdine* analysis.[31] Thus, those courts concluded that, in a Section 8(a)(3) case, as under *Burdine*, only a burden of production should switch to the employer. This analogy to *Burdine* is simply incorrect, since the General Counsel's required showing under *Wright Line* is comparable to the ultimate showing to be made by the Title VII plaintiff under *Burdine*. This Court has indicated in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, *supra*, 431 U.S. at 404 n.9, that, following a showing of discrimination by a Title VII plaintiff, the burden of

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the award of general injunctive relief. In contrast, in a dual motive Section 8(a)(3) case, the Board has concluded that an employer that has been shown to have acted on the basis of a discriminatory motive may escape liability entirely, and thus may avoid entry of a cease and desist order against it, if it can show that it would have taken the same action for legitimate reasons in the absence of the discriminatory motive.

[31] Some confusion may have resulted from the fact that the Board used the term "prima facie" case to describe the General Counsel's burden under *Wright Line* (251 N.L.R.B. at 1089). This Court used the same term to describe the initial showing made by a Title VII plaintiff under the *Burdine* analysis. 450 U.S. at 253. As shown above, the General Counsel's prima facie case under *Wright Line* actually entails proof of the ultimate fact of discriminatory motive and is not analogous to the limited initial showing required of the Title VII plaintiff under the three-part *Burdine* analysis. Like a Title VII plaintiff, the General Counsel always bears the burden of persuasion on the issue of discriminatory motivation. In a Title VII disparate treatment case, that showing will often depend on the employee's ability to support an inference of discrimination by proving the employer's asserted legitimate justification to be a pretext. In an unfair labor practice proceeding, the General Counsel is more likely to be able to establish discriminatory animus without regard to whether a legitimate reason may also have contributed to the employer's decision.

persuasion shifts to the employer, consistent with the *Mt. Healthy* analysis. In *Wright Line* the Board came to a similar conclusion with respect to Section 8(a)(3) cases. Thus, *Wright Line* is fully consistent with the standards this Court has established in the Title VII cases.

C. The Board Concluded Correctly That, Following the General Counsel's Prima Facie Showing, the Respondent Did Not Sustain Its Burden of Showing by a Preponderance of the Evidence That It Would Have Discharged Santillo for Cause Even Absent His Union Activity

The Board found that the General Counsel had "established by strong and credible evidence a *prima facie* case" that respondent's union animus was a "motivating factor" in its decision to discharge Santillo. See page 30, *supra*. The court below did not disturb this finding;[32] nor did the court suggest that it disagreed with the Board's factual determination that respondent failed to establish that it would have taken the same action even in the absence of Santillo's union activity. Rather, the court concluded erroneously that, as a matter of law, respondent could not be required to sustain such a burden, and it refused to enforce the Board's order on that ground alone (Pet. App. 3a).

The Board's determination that respondent did not meet its burden is clearly supported by substantial evidence on the record as a whole. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). Thus, as the Board concluded (Pet. App. 36a), respondent cannot rely on Santillo's leaving his keys in his bus; the record shows that doing so was "common" (*ibid.*) among the drivers and that the company official who discharged Santillo ad-

[32] Indeed, the court expressly sustained (Pet. App. 2a) the factual findings that underlay the Board's conclusion that respondent exhibited "strong union animus" and that it had singled out Santillo as a union instigator and had specifically threatened to take retaliatory action against him.

mittedly decided to do so without relying on that ground (see pages 5-6, *supra*). Nor were Santillo's coffee breaks a dischargeable offense; there, too, the record reveals that such breaks were commonplace at the shop and that "[i]n no case * * * [was a] discharge, suspension or any other kind of disciplinary action taken against employees for engaging in such conduct" (Pet. App. 37a; see page 6, *supra*). Finally, respondent's reliance on Santillo's unauthorized stops at home is equally unavailing; notwithstanding its policy of issuing three warnings prior to a discharge, respondent never confronted Santillo about his unauthorized stops after it had confirmed them; nor did it warn him that such misconduct might lead to disciplinary action (see page 6, *supra*).

In sum, the record amply supports the Board's finding (Pet. App. 13a) that respondent "failed to meet its burden of overcoming the General Counsel's *prima facie* case by establishing by competent evidence that Santillo would have been discharged, even absent his union activities." As shown above, application of that test is fully consistent with the Act and with the decisions of this Court. The Board's conclusion that respondent violated Section 8(a)(3) of the Act in discharging Santillo and its order remedying that violation should be sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 688279 1251

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 82-168.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1982.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORP.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Transportation Management Corp.

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Question Presented.

Whether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), if its hostility to an employee's protected union activities is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activities.

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No. 82-168.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Transportation Management Corp.

Opinions Below.

The opinion of the Court of Appeals (Pet. App. 1a-8a)[1] is reported at 674 F.2d 130. The decision and order of the National Labor Relations Board (Pet. App. 10a-16a) and the decision of the Administrative Law Judge (Pet. App. 17a-45a) are reported at 256 N.L.R.B. 101.

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[1] "Pet. App." refers to the appendix to the petition for writ of certiorari; "J.A." refers to the joint appendix prepared pursuant to Rule 30; "Pet. Brief" refers to the brief of the Petitioner.

Jurisdiction.

The judgment of the Court of Appeals (Pet. App. 9a) was entered on April 1, 1982. The petition was filed on July 30, 1982 and was granted on November 15, 1982 (J.A. 130). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statutory Provisions Involved.

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a) provides in pertinent part:

> It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in pertinent part:

> . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such

> affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . .

Statement of the Case.

Respondent hereby respectfully concurs with the Petitioner's Statement of the Case (Pet. Brief 3-7) with the following modifications, each of which is based upon testimony before the Administrative Law Judge (J.A. 9-106):

1. Patterson, an agent of the Respondent, received complaints in February of 1979 that Santillo was taking unauthorized breaks (J.A. 36-37) and impermissibly parking his equipment at his residence (J.A. 53-54). Respondent consequently installed a working tacograph in Santillo's school bus on March 12, 1979 (J.A. 55). The information recorded by the tacograph allowed the Respondent to determine the time Santillo's bus was in use (J.S. 79-83); and was relied upon in computing his compensatory time (J.A. 55-57). At the conclusion of the working day on March 23, 1979, Patterson read the tacograph for the week of March 19 (J.A. 66, 107, 108) and concluded that Santillo had been compensated for time not worked (J.A. 59, 68, 69).

2. Patterson also found that Santillo had consistently left keys in his bus in contravention of company warnings to the contrary (J.A. 50-52).

Following these events, Santillo was discharged for the above infractions (Pet. App. 24a, J.A. 70).

Summary of Argument.

A. Section 8(a)(3) of the National Labor Relations Act (Act) does not impose an affirmative burden of persuasion upon an employer to prove that a discharge would have occurred in the absence of protected activity. To determine whether a violation of section 8(a)(3) has transpired, the Board must arrive at the "true purpose" for the discharge by weighing the interests of the employee against lawful management objectives of the employer. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, 46 (1937). To arrive at the "true purpose" for the discharge, the First Circuit Court of Appeals fashioned a three-part causation standard consistent with the Act and decisions of this Court. *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). That standard provides that General Counsel as the charging party establish a *prima facie* case of discrimination by showing that protected activity was a motivating factor in the discharge. A burden of production then devolves upon the employer to provide evidence that a legitimate reason existed for the discharge. The burden of proof then rests with the General Counsel to persuasively prove by a preponderance of the evidence that, despite the alleged reason of the employer, a discharge would not have occurred in the absence of union activities. The Court of Appeals' burden of proof standard fully effectuates the policies and purposes of the Act to protect employees suffering adverse employment consequences due to union activity. At the same time, the causation standard recognizes the lawful management rights of employers to discharge employees for cause.

1. The standard of proof set forth by the Court of Appeals is not substantially different from the burden of proof standard

established by this Court for employment discrimination claims under Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000*e*, *et seq.*; *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The *Burdine* proof standard prohibits the imposition of a burden of persuasion on an employer in a Title VII action and provides a reasonable guide for allocating burdens of proof between General Counsel and employer under the Act.

2. The legislative history of the Act supports the Court of Appeals decision that the burden of persuasion remains with the General Counsel for the pendency of a Section 8(a)(3) action. Although the legislative history is silent on the precise allocation of burdens of proof between General Counsel and the employer, Rule 301 of the Federal Rules of Evidence is directly applicable to Board proceedings under Section 10(b) of the Act. In accordance with traditional evidentiary principles, Rule 301 explicitly provides that the party against whom a presumption is imposed merely has the burden of producing evidence to rebut that presumption. The Court of Appeals' burden of proof formulation, therefore, is consistent with Congressional intent that the rules of evidence as applied in the federal district courts apply to all Board proceedings.

Argument.

Under Section 8(a)(3) of the National Labor Relations Act, Once General Counsel Has Made an Initial Showing that Protected Conduct Was a Motivating Factor in the Discharge, the Employer Only Has the Burden of Producing Evidence that the Employee Was Discharged for Cause, After which the General Counsel Carries the Burden of Persuasion in Proving that the Employer Would Not Have Discharged the Employee in the Absence of Union Activity.

Section 8(a)(3) of the National Labor Relations Act (Act) provides that it "shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization."[2] The National Labor Relations Board (Board), pursuant to Section 10(b) of the Act is empowered to conduct hearings into charges of the commission of an unfair labor practice. These proceedings are "conducted in accordance with the rules of evidence applicable in the district courts of the United States . . ." 29 U.S.C. § 160(b). Section 10(c) of the Act requires the Board to determine whether the employer has committed the alleged unfair labor practice based "upon the preponderance of the testimony taken. . .". An employee suspended or discharged

[2] National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3). The statute provides: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

In recent years, unfair labor practices have constituted the great majority of cases received by the Board. In fiscal year 1980, 57,381 cases were received by the Board, 44,063 of which were unfair labor practices. 1980 NLRB Ann. Rep. 240 (Appendix). Similarly, in 1979, the Board received a total of 54,907 cases, of which 41,259 were unfair labor practices cases. 1979 NLRB Ann. Rep. 265 (Appendix).

for cause cannot be ordered reinstated, or granted any back pay by the Board under Section 10(c). 29 U.S.C. § 160(c).

"Dual motive" cases, as in the case at bar, arise under Section 8(a)(3) whenever an employer dismisses an employee for legitimate reasons as well as for union activity. *Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1084 (1980). The statute was intended to protect employees from retaliation for engaging in union activity but was not intended to interfere with the employer's "normal exercise" of selecting or discharging employees. H.R. Rep. No. 1147, 74th Cong., 1st Sess. 19 (1935); *e.g.*, *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311-12 (1965), *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937). In determining whether an employee has been discharged in violation of section 8(a)(3), the decisional body must weigh the interests of the employee against the interest of the employer in operating its business and arrive at the "true purpose" for the discharge. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 45-46. *See generally*, Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 20-24 (1947).

Historically, the Board and courts have differed on the proper causation standard to apply to Section 8(a)(3) actions which has led to the development and application of a number of causation tests. Under the "in part" test, an unlawful discharge arose whenever the General Counsel could prove that an employer was even partially motivated by union activity in discharging an employee. *Allen v. NLRB*, 561 F.2d 976, 982 (D.C. Cir. 1977); *Youngstown Osteopathic Hosp. Assoc.*, 224 N.L.R.B. 574, 575 (1976), 3 NLRB Ann. Rep. 65 (1938).

Retreating from the "in part" test and the absolute liability it imposed upon employers once the General Counsel presented any evidence of anti-union animus, the First Circuit Court

of Appeals fashioned the "dominant motive" standard for dual motive cases. *NLRB v. Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (1st Cir. 1963) (Aldrich, J., concurring). Under this standard, the General Counsel had the burden of proving that the employer's primary or "dominant motive" in dismissing an employee was based upon anti-union sentiment. *See NLRB v. South Shore Hospital*, 571 F.2d 677, 684-85 (1st Cir. 1978); *NLRB v. Fibers International Corp.*, 439 F.2d 1311, 1312 (1st Cir. 1971); *see also Midwest Regional Joint Board v. NLRB*, 564 F.2d 434, 440 (D.C. Cir. 1977); *NLRB v. Billen Shoe Co.*, 397 F.2d 801, 803 (1st Cir. 1968).[3]

In addition to the "in part" and "dominant motive" tests, other hybrid standards of proof emerged. *Waterbury Community Antenna, Inc. v. NLRB*, 587 F.2d 90, 98 (2d Cir. 1978) (board must prove that permissible ground would not have led to discharge); *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d 363, 368 (3d Cir. 1978) (employer violates Act if anti-union animus constituted "real motive" behind discharge). These various tests ultimately led to the present non-uniformity and disagreement among the several federal courts as to which party bears the burden of proof and the proper quantum of proof necessary to impose liability in dual motive cases. *See Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1084-1086 (1980) (tracing development of various tests).[4]

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[3] For a discussion of the "dominant motive" test with an emphasis on its development within the First Circuit, see Du Ross, *Toward Rationality In Discriminatory Discharge Cases: The Impact of* Mt. Healthy Board of Education v. Doyle *Upon the NLRA*, 66 Geo. L.J. 1108 *passim* (1978).

[4] The causation standard used in dual motive causes may be distinguished from the "pretext" cases. A pretext case arises when the employer's purported reasons for the discharge did not exist or were not relied upon. *TRW, Inc. v. NLRB*, 654 F.2d 307, 311 (5th Cir. 1981); *see Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1084 (1980).

In recent years, the Board and the courts have formulated a "but for" or "same-decision" standard of causation for dual motive cases. Under this standard, a violation of the statute occurs only if the employee would not have been discharged "but for" the union activity. *E.g., NLRB v. Eastern Smelting and Refining Corp.*, 598 F.2d 666, 669-671 (1st Cir. 1979); *Coletti's Furniture, Inc. v. NLRB*, 550 F.2d 1292, 1293, 1294 (1st Cir. 1977); *Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1087 (1980). In an attempt to "alleviate the intolerable confusion in the 8(a)(3) area," the Board adopted the "but for" causation test in its *Wright Line* decision. *Wright Line, a Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980). The Board's test has both substantive and procedural components: 1) "General Counsel [must] make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision . . . 2) [T]he burden will [then] shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 251 N.L.R.B. at 1089.

The substantive "but for" test satisfies this Court's requirement that the Board determine the "true purpose" or "real motive" in hiring or firing. *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 675 (1961); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937). While many courts, including the First Circuit, favor the substantive "but for" test, the instant controversy focuses upon the proper allocation of burdens of proof between the employer and General Counsel in imposing this standard. In reviewing the Board's *Wright Line* test, the First Circuit Court of Appeals made clear that although it agreed with the adoption of a "but for" test it disagreed with the Board's allocation of the burdens of proof. *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899, 903-04 (1981), *cert.*

denied, 455 U.S. 989 (1982).[5] The court found that the Board's test impermissibly shifted to the employer the burden of proving, by a preponderance of the evidence that it would have reached the same decision even in the absence of protected conduct. *Id.* at 904. The court held, rather, that:

> . . . once the general counsel has established a basis for finding an improper motive, the employer must merely 'come forward with enough evidence to convince the trier of fact that, under the circumstances, there is no longer a preponderance of evidence establishing a violation.'

Id. at 904, *quoting NLRB v. Amber Delivery Service*, 651 F.2d 57, 69 (1st Cir. 1981); *NLRB v. Cable Vision*, 660 F.2d 1, 8 (1st Cir. 1981).

In the decision below, the Board found that the employer violated Section 8(a)(3) because it failed to meet its burden of "*overcoming* the General Counsel's *prima facie* case by establishing competent evidence that Santillo would have been discharged even absent his union activities." *NLRB v. Transportation Management Corp.*, 674 F.2d 130, 131 (1st Cir. 1982). The First Circuit rejected this effort by the Board to impose a greater burden than that of "neutralizing" General Counsel's case as being outside the Board's authority and inconsistent with the Act. *Id.* It remanded the case to the Board for reconsideration consistent with its prior decision. *Id.* at 131-32. It is precisely this procedural burden-shifting component of the Board's *Wright Line* test that has created

[5] The First Circuit in comparing the "but for" test of *Wright Line* with the previous practice of the Board to use an "in part" test commented: "We start by observing that the Board's new rule seems better than its old one." *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d at 902. *See generally* 16 Suffolk U. L. Rev., 226, *passim* (1982) (reviewing impact of *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981)).

confusion among the courts and the Board.[6] The Board's continued misallocation of the burden of proof in dual motive cases leaves employers and the Board alike without a clear formulation of their respective burdens.

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[6] The Second Circuit Court of Appeals has not yet commented upon the burden shifting analysis of the Board's *Wright Line* case. *NLRB v. Charles Batchelder Company*, 646 F.2d 33, 38-39 (2d Cir. 1981).

The Third Circuit recently rejected the Board's *Wright Line* test and held that only a burden of production shifts to the employer once Board asserts its initial case, *Behring International, Inc. v. NLRB*, 675 F.2d 83, 89 (3d Cir. 1982); *see also NLRB v. Blackstone, Inc.*, 685 F.2d 102, 105, 106 (3d Cir. 1982).

The Fourth Circuit has not yet indicated whether the Board's *Wright Line* test is an appropriate one. Instead, it utilizes a test more in line with the First and Third Circuits, requiring that the Board show an "affirmative and persuasive reason why the employer rejected the good cause and chose a bad one." *NLRB v. Burns Motor Freight Line, Inc.*, 635 F.2d 312, 314 (4th Cir. 1981) *citing NLRB v. Patrick Dodge, Inc.*, 522 F.2d 804, 807 (4th Cir. 1975), *quoting NLRB v. Billen Shoe Company*, 397 F.2d 801, 803 (1st Cir. 1968); *see also Jeffrey Mfg. Division v. NLRB*, 654 F.2d 944, 948 (4th Cir. 1981).

It is unclear whether the Fifth Circuit has adopted the burden-shifting analysis of the *Wright Line* case. In *NLRB v. Robin American Corp.*, 654 F.2d 1022 (5th Cir. 1981) the court stated that once general counsel has established a dual motive case, the burden shifts to the employer to demonstrate that the same action would have been taken in the absence of protected conduct. 654 F.2d at 1025. The court, however, did not outline whether an affirmative burden of persuasion shifts to the employer. In contrast, the Fifth Circuit in *TRW, Inc. v. NLRB*, decided one week before the *Robin* case, held that the burden remains on the general counsel to find an "affirmative and persuasive reason why the employer rejected good cause and chose an illegal one," thus inferring that a burden of persuasion does not shift to the employer. 654 F.2d 307, 310 (5th Cir. 1981). More recently, the Fifth Circuit indicated that it has approved of the Board's *Wright Line* test. *Red Ball Motor Freight, Inc. v. NLRB*, 660 F.2d 626, 627-28 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2282 (1982). The *Red Ball* court, however, did not specifically address the burden-shifting analysis of the Board.

The Sixth Circuit has held that the employer has the burden of persuasion in proving that the discharge would have taken place in

A. The Court of Appeals' allocation of burdens of proof fully effectuates the policy and purposes of the Act as construed by this Court.

In *NLRB v. Wright Line*, the First Circuit Court established a three-part standard of proof for section 8(a)(3)

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the absence of the protected activity. *Republic Die and Tool Company v. NLRB*, 680 F.2d 463, 464, 465 (6th Cir. 1982). The Sixth Circuit has also cited the Board's *Wright Line* test with approval. *Borel Restaurant Corp. v. NLRB*, 676 F.2d 190, 193 (6th Cir. 1982); *Charge Card Association v. NLRB*, 653 F.2d 272, 275 (6th Cir. 1981); *NLRB v. Lloyd A. Fry Roofing Company*, 651 F.2d 442, 446 (6th Cir. 1981).

In *Peavey Company v. NLRB*, 648 F.2d 460 (7th Cir. 1981), the Seventh Circuit chose to follow the Board's *Wright Line* case. Like other courts, however, the burden-shifting analysis was not explained. *See also NLRB v. Berger Transfer and Storage Co.*, 678 F.2d 679, 691-92 (7th Cir. 1982).

The Eighth Circuit approved the burden shifting test of the Board in *NLRB v. Senftner Volkswagen Corp.*, 681 F.2d 557, 560 (8th Cir. 1982) and in *NLRB v. Fixtures Manufacturing Corp.*, 669 F.2d 547, 550-51 n.4 (8th Cir. 1982).

The Ninth Circuit has approved the Board's *Wright Line*'s procedural shift, but like other circuits, the court has not discussed the general counsel's statutory burden of proof. *See NLRB v. Nevis Industries, Inc.*, 647 F.2d 905, 909 (1981); *see also Doug Hartley, Inc. v. NLRB*, 669 F.2d 579 (9th Cir. 1982).

In *NLRB v. Carbonex Coal Company*, the Tenth Circuit recently stated: "whether *Wright Line* cleared up a gray area, or, on the contrary, compounded the entire problem, is debatable." 679 F.2d 200, 203 (10th Cir. 1982). The Tenth Circuit is undecided on the issue of allocating the burdens of proof.

In a recent Eleventh Circuit case, the court declined to comment on the propriety of the *Wright Line* burden shifting test because the record presented was insufficient to support a charge under Section 8(a)(3). *See Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 491 n.4 (11th Cir. 1982). Nevertheless, the court stated: "Regardless of who has the burden of going forward with evidence, the General Counsel must prove by substantial evidence on the record as a whole that union animus actuated the plant closing." *Id.*

To date, the D.C. Circuit has not commented on the applicability of the Board *Wright Line* test to dual motive cases. The current standard of the court is in accord with the First and Third Circuits:

violations: 1) The General Counsel must first make a *prima facie* showing sufficient to support the *inference* that [the employer's opposition to] protected conduct was a motivating factor in the employer's discharge decision; 2) The burden of production then shifts to the employer to come forward with credible evidence to rebut or meet the general counsel's *prima facie* case; 3) Assuming the employer meets its burden of production, General Counsel carries the burden of persuasion in proving the existence of an unfair labor practice. *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899, 903, 905 n.9.[7]

Although the Court of Appeals adopted the Board's "but for" test in dual motive cases, it rejected the Board's attempt to place upon the employer the burden of persuading the trier of fact that it would have taken the same action notwithstanding the protected activity. *Id.* at 905. As the court stated: "Let there be no mistake here . . . The burden of persuasion on all issues of disputed fact rests at all times with the general counsel." *Id.* at 905 n.9.

The test adopted by the Court of Appeals fully effectuates the purpose of the Act. The Act provides a remedy only to an employee suffering adverse employment consequences because of union activities. *Radio Officers' v. NLRB*, 347 U.S. 17, 42-43 (1954). The Act does not empower the Board to

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The general counsel's responsibility is not simply to present some evidence of improper motive but to find an "affirmative and persuasive reason why the employer rejected the good cause and chose an illegal one." *Clothing Workers Mid-West Regional Joint Board v. NLRB*, 564 F.2d 434, 440 (D.C. Cir. 1977). The D.C. Circuit's standard therefore, would not warrant shifting the burden of persuasion onto the employer and presumably is at odds with the Board's *Wright Line* test.

[7] The Board itself adopted the first component of this test in its own *Wright Line* decision, 251 N.L.R.B. at 1089. In Petitioner's brief, however, the Board appears to have changed its proof standard by requiring that the General Counsel first prove "by a preponderance of the evidence that the employee's conduct was *in fact* a motivating factor in the employer's disciplinary decision" (Pet. Brief 30).

dispense its own brand of industrial justice; rather, the Board is authorized to act only where an employee has suffered job loss due to participation in union activity. *NLRB v. Fansteel Corp.*, 306 U.S. 240, 253-56 (1939). In the words of the Court, the Board cannot "interfere with the normal right of the employer to select its employees or to discharge them . . ." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937).

The Court of Appeals properly recognized that the imposition of an affirmative burden of persuasion on the employer would unduly interfere with lawful management prerogatives. Under the Board's test, rejected by the First Circuit, the General Counsel may establish a right to relief merely by showing the employee's participation in protected activities. To the extent that the Board thus imposes a heavy burden on a respondent, merely by establishing a *prima facie* case of discrimination, the Board's test represents an undue interference with management prerogatives. *Cf. Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (*prima facie* case in Title VII action not "onerous"). The Court of Appeals' test, on the other hand, properly balances the interests of employee and employer as compelled by the language, legislative history, and policies of the Act. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963). In acknowledging the presumed legitimacy of Respondent's justification for its action and imposing upon the General Counsel the burden of establishing that the employer's reason was not the dispositive reason for the discharge, the Court of Appeals' test assures that only in those cases where the proof undercuts the legitimacy of Respondent's justification will relief be awarded. Thus, the Court of Appeals' test promotes the policies of the Act while simultaneously respects lawful employer objectives. *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311-12 (1965).

Indeed, even the position taken by the Petitioner implicitly acknowledges the error of the Board's ways in *Wright Line*. Rather than relying upon the allocation of burdens of proof stated by the Board in that decision, Petitioner now suggests that the thrust of *Wright Line* is for the General Counsel to "prove by a preponderance of the evidence that the employee's protected activity was *in fact* a motivating factor in the employer's disciplinary decision" (Pet. Brief 30). Not only does this statement of the "test" fail to fully set forth the Board's *Wright Line* test, it points up the correctness of the Court of Appeals decision. In stating that General Counsel must prove protected activity was "in fact" a motivating factor, the Board merely restates the language of Section 10(c). The difficulty, however, lies in isolating the "in fact" reason, a task left wholly unaided by Petitioner's position. Rather, as recognized by the Court of Appeals, the imposition of a burden of production on the employer to nullify the presumptive effect of the General Counsel's *prima facie* case, serves most precisely to identify the factual dispute. Only *after* such a factual dispute has been fully identified can the General Counsel meet its burden of proof. The Board's *Wright Line* test ignores the need to identify the crucial fact issues and leaves the trier of fact unaided in that it fails to adequately specify the precise and appropriate *means* for identifying the factual dispute. It is this shortcoming and the concomitant disregard for the employer's legitimate interests that attests to the correctness of the Court of Appeals' decision.

Virtually conclusive support for the Court of Appeals rationale is found in the analogous decision of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), a sex discrimination action brought under Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000*e et seq.* In that case, this Court established a three-part causation test to establish a case of employment discrimination: first, the plaintiff

establishes a *prima facie* case of discrimination;[8] the employer must then come forward with a legitimate nondiscriminatory reason for its employment decision; following which the plaintiff must show that the "proffered reason was not the true reason for the employment decision." 450 U.S. at 252, 253, 256; *accord Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 n.2 (1978) (employer need only explain what he has done); *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577, 578 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). At all times the plaintiff retains the burden of persuasion and only a burden of production to rebut the presumption of discrimination devolves upon the employer. *Id.* at 254, 256; *accord Ford Motor Company v. E.E.O.C.*, 102 S. Ct. 3057, 3061 n.7 (1982).

As noted by this Court in *Albemarle Paper v. Moody*, 422 U.S. 405 (1975), the policies and purposes of Title VII are analogous to the Act in that Title VII is not designed or intended to interfere with the exercise of normal employer functions while at the same time it assures that those who have been the victims of unlawful discrimination receive relief. *Id.* at 419-20; *McDonnell Douglas Corp. v. Green*, 411 U.S. at 803, 804; *NLRB v. Fansteel Corp.*, 306 U.S. 240, 255 (1939). In the court's *Wright Line* decision, the First Circuit adopted a test virtually identical to that of the *Burdine* Court, correctly recognizing the similar policies underlying both Title VII and the Act. As the Third Circuit recognized in adopting the First Circuit standard of proof for dual motive cases under Section 8(a)(3):

> "[t]he Supreme Court recognized the problems of proof in the *Burdine* line of cases, but concluded that

[8] To establish a *prima facie* case under Title VII, "[t]he plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified but was rejected under circumstances which give rise to an inference of unlawful discrimination." 450 U.S. at 253.

> only the burden of production, and not persuasion, shifts to the defendant. Since the same considerations are present where the discrimination is based on union activity, the Board should follow the *Burdine* procedure in those cases as well."

Behring International, Inc. v. NLRB, 675 F.2d 83, 89 (3d Cir. 1982).

The Petitioner relies heavily on *Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274 (1977) in support of its position that a burden of persuasion shifts to the employer in Section 8(a)(3) cases. In *Mt. Healthy*, in which an employee alleged that his discharge violated constitutionally protected rights, the Court required that an employee establish a *prima facie* case of discrimination by proving that protected conduct constituted a "motivating factor" in the discharge. Subsequently, the Court declared that the employer bears the burden of persuasion to prove that the dismissal would have occurred even in the absence of the protected activity. 429 U.S. at 285. Although the Court imposed a burden of persuasion upon the employer, the facts of that case are distinguishable from the case at bar. In *Mt. Healthy*, the school board employer admittedly discharged the employee for activity protected by the first amendment, but contended that the reinstatement remedy was inappropriate because of other unprotected conduct engaged in by the employee. *Id.* at 283, 284.[9] Because the employer violated the employee's constitutionally protected rights, the Court shifted the burden to the school board to show by a preponderance of the evidence that it "would have reached the same decision as to respondent's employment even in the absence of the protected conduct."

[9] The school board was expressly concerned with the teacher's "notable lack of tact in handling professional matters," for making "obscene gestures" to discipline students, and for distributing an administrative memorandum on the school dress code to a local radio station. 429 U.S. at 282, 283 & n.1.

Id. at 287. In other words, the burden imposed upon the employer became an affirmative defense.

In contrast, Respondent in this case has not conceded that Santillo was discharged for union activities. Rather, the threshold issue remains whether anti-union animus actually motivated the Respondent's decision to discharge Santillo. Distinguishing *Mt. Healthy* from dual motive cases, the First Circuit Court of Appeals noted:

> [t]he employer's claim [in *Mt. Healthy*] was thus a true affirmative defense which went to the appropriateness of the remedy being applied rather than to the existence of a violation in the first instance. By contrast, in the typical labor case, the employer vigorously disputes the determining reason for the discharge. These cases . . . do not involve true affirmative defenses going to the appropriateness of the remedy . . ."

662 F.2d at 906.

Furthermore, the *Mt. Healthy* Court balanced competing interests in a constitutional setting whereas here Congress has enacted a statute which balances the competing interests of employer and employee. *Cf. Washington v. Davis*, 426 U.S. 229, 239 (1976) (constitutional standard for adjudicating equal protection not identical to standards applicable under Title VII).

Petitioner's reliance on *NLRB v. Great Dane Trailers, Inc*, 388 U.S. 26 (1967) is also misplaced. (Pet. Brief 36 n.24). To the contrary, *Great Dane* strongly supports the correctness of the result reached by the Court of Appeals. In that case, respondent company allegedly discriminated against a class of employees in refusing to pay vacation benefits to striking workers. 388 U.S. at 30. The Court held that once General Counsel proves that the employer engaged in discriminatory activity, the employer must "come forward with evidence of legitimate and substantial business justifications for the conduct." *Id.* at 34. Not only does *Great Dane* fail to sanction the imposition of an affirmative burden of persuasion on the

employer to rebut the General Counsel's *prima facie* case, if anything, the language used by the Court ("come forward with the evidence") is suggestive of a burden of production. *See* McCormick on Evidence, § 338 at 791-92 (Cleary ed. 1972).

Since the standard of proof articulated in *Mt. Healthy*, notwithstanding *Great Dane*, is inapplicable to Section 8(a)(3) cases, we are left with a burden of proof formulation which parallels the *Burdine* standard. The proper allocation of the burden of proof in dual motive cases, therefore, requires that General Counsel establish a *prima facie* showing that the motivating factor for the discharge of the employee was protected activity. The employer must then produce evidence of a legitimate reason(s) for the discharge. General Counsel carries the burden of persuasion to show, by a preponderance of the evidence that the employee would not have been discharged in the absence of protected activity. This test is consistent with the Act. Moreover, it will foster discovery of the "true purpose" of the discharge as well as the motive of the employer. *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 675 (1961).[10]

Finally, the proposed formulation satisfies the teachings of *Jones & Laughlin*; that the Act was not intended to interfere with the normal right of an employer to select or discharge employees for cause. 301 U.S. 1, 45-46.

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[10] At no time was General Counsel without the opportunity to prove that Respondent's alleged conduct was unlawful. The liberal rules of discovery applicable to any civil suit were available to the General Counsel and the Board. 28 U.S.C., Fed. R. Civ. P., Rules 26-37.

B. The Court of Appeals properly construed the Act and properly applied the rules of evidence in determining that the burden of persuasion remains with the General Counsel for the duration of a Section 8(a)(3) action.

The Act supports the Court of Appeals' *Wright Line* decision that the burden of persuasion never shifts to the employer in a Section 8(a)(3) dual motive action.

Section 10(b) of the Act as amended in 1947 provides that "so far as practicable" the rules of evidence applicable in the district courts of the United States shall apply to Board proceedings. 29 U.S.C. § 160(b).[11] The amendment added the last sentence to section 10(b), directing observance of the rules of evidence applicable in the district courts and substituting this provision for one that had read "in any such proceeding the rules of evidence prevailing in the courts of law or equity shall *not* be controlling" (emphasis added). Ch. 372, § 10(b), 49 Stat. 449 (1935). The Congressional purpose behind the amendment was to prevent the indiscriminate use of "expert" evidence in Board proceedings and to permit more effective judicial review of Board orders. H.R. Conf. Rep. No. 510, on H.R. 3020, 80th Cong., 1st Sess. (1947), *reprinted in* 1 NLRB Legislative History of the Labor Relations Management Act, 1947, 534-36 (1948); H. R. Rep. 245, on H.R. 3020, 80th Cong., 1st Sess. (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Relations Management Act, 1947, 292, 331-32 (1948); *see Pittsburgh S. S. Co. v. NLRB*, 180 F.2d 731,

[11] The language "so far as practicable" does not dilute the force of the statute. These words are only intended to authorize the Board to depart from rules of evidence to the extent necessary due to the peculiar characteristics of administrative hearings. *General Engineering, Inc. v. NLRB*, 341 F.2d 367, 374 (9th Cir. 1965).

734 (6th Cir. 1950) *aff'd*, 340 U.S. 498 (1951).[12]

As a consequence of Section 10(b), as amended, the Federal Rules of Evidence are applicable to Board proceedings. Fed. R. Evid. 1101. Moreover, both Board and court decisions construing Section 10(b) have generally held that the Federal Rules of Evidence apply to the trial examiners as well as Board proceedings. *E.g., NLRB v. International Union of Operating Engineers*, 413 F.2d 705, 707 (9th Cir. 1969); *NLRB v. Amalgamated Meat Cutters & Butchers Workmen*, 202 F.2d 671, 673 (9th Cir. 1953); *Sears Roebuck & Company*, 224 N.L.R.B. 558, 559 (1976).

Since the Federal Rules of Evidence bind the Board, Rule 301, which governs the allocation of burdens of proof, controls the standard of proof applicable in dual motive discharge actions under Section 8(a)(3).[13] Rule 301 codifies the

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[12] In the House report on H.R. 3020, Chairman Hartley indicated that Section 10(b) prior to the proposed amendment "resulted in what courts have described as 'shocking injustices' in the Board's rulings, 'assinine reasoning by the Board', 'findings overwhelmingly opposed by the evidence,' findings that 'strain our credibility' and 'remarkable discrimination' on the part of the Board in believing its own witnesses and in disbelieving others." (citations omitted). H.R. Rep. 245, on H.R. 3020, 80th Cong., 1st Sess. (1947) *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, 292, 332 (1948).

[13] Rule 301 provides: "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." Pub. L. No. 93-595, 88 Stat. 1926 (1975), (codified at 28 U.S.C., Fed. R. Evid. 301). Under the so-called "bursting bubble theory," the presumption of unlawful discrimination should disappear when the employer introduces evidence that it discharged the employee for cause. Fed. R. Evid. 301, Advisory Note. Rule 301 codifies traditional evidentiary theory. Although the concept of burden of proof

traditional principle of proof that the party against whom a presumption is imposed has the burden of going forward with enough evidence to rebut the presumption. 28 U.S.C., Rule 301. The burden of persuasion rests with the plaintiff or charging party. J. Wigmore, Evidence, § 2487 at 282 (3d ed. 1940), *quoting Speas v. Merchants' Bank & Trust Co.*, 188 N.C. 524, 125 S.E. 398 (1924). Applying Rule 301 to Section 8(a)(3), the General Counsel must first establish a *prima facie* case of unlawful discrimination to have a presumption of unlawful conduct operate in its favor. The burden of production then shifts to the employer to show that the employee was terminated for cause. If the employer meets its burden of production, the burden of persuasion remains on the General Counsel to prove that the employee would not have been discharged in the absence of protected activity. *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d at 905 & n.9. Consistent with the legislative history of Section 10(b) and the subsequent adoption of Rule 301, this Court should reject the Board's *Wright Line* test which impermissibly shifts a burden of *persuasion* onto the employer once General Counsel has established a *prima facie* case.

The Administrative Procedures Act (A.P.A.), 5 U.S.C. § 550, *et seq.* is also applicable to Board proceedings. *NLRB v. Amalgamated Meat Cutters and Butchers Workmen*, 202 F.2d 671, 673 (9th Cir. 1953); *Pittsburgh S. S. Co. v. NLRB*, 180 F.2d 731, 732-36 (6th Cir.) *aff'd*, 340 U.S. 498 (1950). Section 7(c) of the A.P.A. provides that the "proponent of a rule has the burden of proof." 5 U.S.C. § 556(d). Since the Board is an

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is a basic principle of law, Professor Wigmore aptly noted that the difficulties in determining who bears the burden of proof and significance of the burdens "arise not so much from the intrinsic complication or uncertainty of the situation as from the lamentable ambiguity of phrase and confusion of terminology under which our law has so long suffered." 9 J. Wigmore, Evidence § 2485, at 283 (Chadbourne Rev. 1981).

agency bound by the A.P.A., the General Counsel, as the proponent, should bear the burden of persuasion in Section 8(a)(3) actions. It thus follows that the Board's imposition of a burden of persuasion onto the employer violates the A.P.A. *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d at 903.[14]

Section 10(c) of the Act as amended in 1947 governs reinstatement for violations occurring under Section 8, providing that the Board may order reinstatement of an employee with back pay if it finds upon a "preponderance of the testimony" that the employer violated Section 8(a)(3). 29 U.S.C. 160(c). The amendment substituted a "preponderance of the testimony" standard in lieu of the 1935 language which had required that the Board weigh "all the testimony." National Labor Relations (Wagner) Act, ch. 372, § 10(c), 49 Stat. 449 (1935) *reprinted in* 2 NLRB, Legislative History of The National Labor Relations Act, 1935, at 3275 (1949).

The Petitioner strongly relies on a Senate Conference Committee Report on the 1947 amendments to section 10(c) to support its proposition that Congress intended the employer to bear the burden of persuasion in disproving alleged unfair labor practice actions (Pet. Brief 21-22). In that report, Senators Taft and Pepper debated on the proper burden of proof the employer carries to avoid reinstatement under section 10(c). 93 Cong. Rec. 6518-19 (1947). Their debate, however, was limited to a discussion of reinstatement once a violation is proven, and was silent on the actual *allocation* of burdens of proof between the employer and General Counsel in proving a Section 8(a)(3) violation. A close examination of the conference report reveals that Congress made no reference to the issue of whether a burden of persuasion or production devolves upon an employer in rebutting a *prima facie*

[14] The Board's own regulations even provide that "[t]he Board's attorney has the burden of proof of violations of section 8." 29 C.F.R. 101.10(b).

case of unlawful discrimination. *See Zurn Industries, Inc. v. NLRB*, 680 F.2d 683, 693 (9th Cir. 1982); *Behring International, Inc. v. NLRB*, 675 F.2d 83, 90 n.6 (3d Cir. 1982); *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d at 904 n.8 (1st Cir. 1981).[15] The contention of the Board,

[15] The pertinent debate between Senators Taft and Pepper was as follows:

MR. PEPPER: Mr. President, turning to page 34 of the conference committee print, the conference has added the following language to the Senate bill:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

That looks like a very simple and innocent provision. It may seem on its face to be a very proper provision, for it appears only to give the employer the right to discharge a worker for good reason. But this is what the provision does: Under the present law a worker may be discharged by his employer for cause, but the Board may go into the real reasons for the discharge, and if the Board finds that although cause was given as the excuse, the real reason was the fact that the worker was trying to organize a union or trying to join a union, the Board may set aside the act of the employer and require the reinstatement of the worker upon that evidence. But this language allows a worker to be discharged because of union activities, although that may be only a concurrent cause of discharge.

In other words, if an employer has been allowing workers to smoke in a prohibited area, if he has been allowing workers to show up late for work, if he has been letting them quit ahead of time at the end of the day, or violate any other rules, yet if a given employee, because he has been engaged in union activities which the employer does not like, is selected out of the crowd and discharged for violating a rule, and no one else is discharged for violating the rule, or if it can be shown that the real motivating reason which caused the employer to fire the worker was his union activities, if cause existed it would be a basis for discharge, and this provision would forbid the Board to reinstate the worker. As a practical matter, that is the effect of that language.

MR. TAFT: I think the Senator is completely mistaken. That is not all the effect of this language. It merely states the present rule. If a man is discharged for cause, he cannot be reinstated. *If he is discharged for union activity, he must be reinstated. In every case*

then, that "Congress specifically approved the allocation of burdens of proof reflected in the Board's standard . . ." (Pet. Brief 21-22) is wholly unsupported.

Concluding that the legislative history of Section 10(c) is ambiguous on the issue of burdens of proof, reference must

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it is a question of fact for the Board to determine.

The House language provided that the burden of proof should be on the employee to show that he was not discharged for cause. The Senate conferees took the position that the question was whether he was discharged for cause, and that the burden of proving that cause should be on the employer, because the information is in his hands. So we did not accept the House provision. All this language does is simply to say exactly what the present rule is. If the Board finds that the man was discharged for cause, that is one possible outcome. If it finds that he was discharged for union activity, that is the other outcome. *The Board must determine the facts in every case.* For years it has had to determine in every case whether a man was discharged for cause or for union activity. In my opinion this language in no way changes the existing provision of law, after the modification which we forced in the House provision.

MR. TAFT: We said, "We will accept this language if you will eliminate the other." Naturally the House conferees wanted to show that some of the House language was preserved. In general they accepted the entire basis of the Senate bill and the Senate language. What we did here, in effect, was to say, "If you will modify the language so that it does not change the existing law, we will accept it, and you can point to it as one of the instances in which the House language instead of the Senate language was accepted."

MR. PEPPER: We have an admission from the Senator from Ohio that the language was intended to mean something. *It was intended to shift the burden of proof from the employer to the employee* . . . I wish to quote from the conference report, and I hope Senators will attend what I am about to quote. I suggest that the result of the conference report is to leave the interpretation of the language exactly as the House intended it. Let us see if that is correct. I read from page 55 of the conference report:

> (10) The House bill also included, in section 10(c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged

be made to the textual construction of the Act. C. Sands, 2A Sutherland Statutory Construction § 48.01, at 182 (4th ed. 1973). It is a well established principle of statutory construction that all parts of a statute should be construed together. *Id.* § 51.01, at 288. Here, Section 10(b) unambiguously

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for cause. The Senate amendment contained no corresponding provision. The conference agreement omits the "weight of evidence" language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause (see *Wyman-Gordon* v. *N.L.R.B.*, 153 Fed. (2) 480), will not be entitled to reinstatement. The effect of this provision is also discussed in connection with the discussion of section 7.

That shows that the Senate conferees agreed to the elimination of the words "weight of evidence," because they do not use those words which are necessary to accomplish the effect which the House sought to achieve. They say that under the rules of the Board itself the Board had to find by a preponderance of the evidence, and therefore there was not any need to put in the words of the House; but they do not disaffirm the purpose of the House, which the Senator from Ohio has acknowledged this afternoon.

MR. TAFT: The conference report does not quite say what the Senator from Florida suggests. The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board. *The Board will have to determine—and it always has—whether the discharge was for cause or for union activity, and the preponderance of the evidence will determine that question.* The mere fact that there may be a little cause or real reason would not in any way lead the Board to refuse to give the employee reinstatement and back pay.

provides that the rules of evidence apply to Board proceedings, and as previously discussed, Rule 301 of the Federal Rules of Evidence prevents shifting a burden of persuasion onto the employer. Although the legislative history of Section 10(c) may be inconclusive, 10(c) should be read together with Section 10(b).[16] In so doing, this Court should adopt the reasoning of the court below that any effort by the Board to impose upon the Respondent a greater burden than "neutralizing the implication of sufficient anti-union motive arising from the General Counsel's *prima facie* case" is outside the Board's statutory authority. 674 F.2d at 131.

C. Respondent satisfied its burden by producing evidence that Santillo was terminated for cause.

In light of the three-part burden of proof scheme enunciated by the Court of Appeals in its *Wright Line* decision,

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MR. PEPPER: I do not desire to prolong the argument, because I wish to conclude. I shall have to let the matter stand on the statement of the Senator from Ohio as to the intention of the House in its original bill, what I read from the report of the conferees, and the fact that the language to which I have alluded was put in the bill at all, which certainly was intended to have some effect. Here is the importance of it. It is always a difficult matter to determine the real reason of the employer in discharging a worker. There can always be found some sort of excuse if it is desired to find one. If the employer does not give the worker the benefit of the doubt he can always wait until he smokes a cigarette three feet before he gets out of the door, or find some error that would constitute cause. *The provision shifts the burden of proof to make the worker show he was discharged for union activities, rather than to make the employer show that the worker was discharged for cause.*

[16] Petitioner also infers that its construction of the Act has become part of the statute by reason of congressional acquiescence. This is not the rule, where as here, the Courts of Appeals are divided on the reading of the statute. *See NLRB v. Radio and Television Broadcast Engineers Union Local 1212*, 364 U.S. 573, 585 (1961). As Professor Sands aptly states: "[e]xperience indicates that a legislature does not deliberately enact inconsistent provisions when it is cognizant of them both, without expressly recognizing the inconsistency." Sands, *supra* § 51.01, at 288.

Respondent in the instant case has met its burden of production. General Counsel established a motivating factor for the discharge by showing that Santillo had some contact with a labor union and that Respondent was aware of Santillo's involvement. Respondent then provided evidence that Santillo was discharged for misusing compensatory time and leaving keys in his vehicle (J.A. 59).

Consistent with the Court of Appeals' burden of proof formulation, General Counsel subsequently had the burden of proving that a violation of Section 8(a)(3) occurred. Here, however, General Counsel acted pursuant to the Board's *Wright Line* test and failed to establish persuasively by a preponderance of the testimony that Santillo would not have been discharged in the absence of his union activity. The Board's procedural test rejected the Respondent's legitimate and nondiscriminatory reasons for the discharge as neutralizing the General Counsel's *prima facie* case. Furthermore, the Board failed to find the "true reason" for the discharge. *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 256; *Local 357, Teamsters International v. NLRB*, 365 U.S. at 675.

Consistent with decisions of this Court and the purpose of the Act, the court below properly remanded the case to the Board for reconsideration under the standard enunciated by the First Circuit in *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, to determine whether Santillo would have been discharged in the absence of protected activity.

Conclusion.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed and the case remanded to that court for remand to the Board, with instructions to apply the burden of proof standard formulated in *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981).

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Office-Supreme Court, U.S.
FILED
MAR 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-168.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1982.

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PETITIONER,

v.

TRANSPORTATION MANAGEMENT CORP.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Supplemental Brief for the Transportation Management Corp.

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Introduction.

Pursuant to Supreme Court Rule 35.5, the Respondent, Transportation Management Corp., respectfully submits this supplemental brief in light of the recent decision of *NLRB v. New York University Medical Center*, No. 450, slip. op. (2d Cir. Jan. 21, 1983). The first publication of the case appeared in the Bureau of National Affairs Daily Labor Report on February 4, 1983 and was received by counsel for the Respondent on February 8, 1983. [1983] 25 Daily Lab.Rep. (BNA) D-1-D-10 (Feb. 4, 1983). Since this decision came to the attention of the Respondent subsequent to January 31, 1983 - the date of the Respondent's brief, the case qualifies as a late authority under the Supreme Court Rules and entitles the Respondent to file a supplemental brief on the merits. Supreme Ct. R. 35.5. The Respondent respectfully requests that the Court consider the Second Circuit court decision in resolving the question pending before the Court.

* copy lodged

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Argument.

A. THE PLAIN MEANING OF SECTION 10(C) OF THE NATIONAL LABOR RELATIONS ACT SUPPORTS THE DECISION OF THE COURT BELOW THAT THE BURDEN OF PERSUASION NEVER SHIFTS TO THE EMPLOYER IN A SECTION 8(A)(3) DUAL MOTIVE DISCHARGE ACTION.

Section 10(c) of the National Labor Relations Act (Act) provides in pertinent part:

> . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: . . .

29 U.S.C. § 160(c).

In a well reasoned and thorough analysis of Section 10(c) of the Act, the United States Court of Appeals for the Second Circuit recently renounced the procedural burden-shifting element of the Board's *Wright Line* test in *NLRB v. New York University Medical Center*, No. 450, slip. op. (2d Cir. Jan. 21, 1983). In accordance with the result reached by the court below in the instant case, the Second Circuit court held that the burden of persuasion never shifts to the employer. Slip. op. at 1341, 1356.[1] In rejecting the validity of the Board's

[1] In *N.Y.U. Medical*, dissident members of a hospital union, initiated a leafletting drive among Medical Center employees asking for their votes in an upcoming union election. The leaflets accused N.Y.U. Medical Center management of using "racist" and "fascist" tactics to intimidate Black and Hispanic workers. Slip. op. at 1342-1345. Three employees involved in the leafletting were issued warning letters. Two of the employees were suspended for their involvement in distributing the leaflets and for picketing, one of whom was discharged for similar reasons. *Id.* at 1345-1346. The General Counsel for the NLRB filed a complaint alleging that the Center's disciplinary measures violated Section 8(a)(1) of the Act. The Administrative Law Judge and the Board found the Medical Center's disciplinary measures violated Section 8(a)(1) since the employees were engaged in protected leafletting activity. The Board, however, did not determine whether the picketing was protected activity or more importantly, whether the Center would have pursued the same course of action in the absence of the protected leafletting activity. The Board entered a cease and desist order against the Center mandating: reinstatement with back pay for the discharged employee; compensation for losses sustained by

Wright Line test, Judge Timbers writing for the court commented: "We agree that shifting the burden of persuasion to the employer frustrates the balance between the employer and employee rights struck in the Act." *Id.* at 1356.[2]

The Second Circuit court decision is instructive in determining the proper allocation of burdens of proof under the Act.[3] First, the *N.Y.U. Medical* decision is in harmony with the position taken by the Respondent that the Board misallocated the burdens of proof under Section 8 of the Act. (Resp. Brief 27). Noting that the resolution of the burden of proof issue is a matter of statutory interpretation proper for the courts, rather than the Board to resolve, the court stated:

> At the outset of our analysis, we note that deciding the proper allocation of burdens is not within the Board's special competence "of applying the general provision of the Act to the complexities of industrial life . . . and of '[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of the particular case' " *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979) (citations omitted). Rather, the issue presented is a matter of statutory interpretation deserving greater scrutiny: "questions of statutory interpretation, especially when arising in the

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the suspensions; and rescission of the warning letters. *Id.* at 1347. The court, consistent with its decision, remanded the case to determine whether the Board would have reached the same result had it properly imposed a burden of production on the employer. *Id.* at 1369-70.

[2] Prior to the *N.Y.U. Medical* decision, the Second Circuit court had not determined the applicability of the Board's *Wright Line* test to unfair labor practice violations within the circuit. *See NLRB v. American Geri-Care, Inc.* No. 180, slip. op. (2d Cir. Dec. 23, 1982); *NLRB v. Chas. Batchelder Co.*, 656 F.2d 33, 38-39 (2d Cir. 1981).

[3] If the *N.Y.U. Medical* decision had been available before the Respondent's Brief on the Merits was filed, the argument contained herein would have appeared on page 23 of the Respondent's brief.

> first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose specific duty it is to administer the questioned statute" *NLRB v. Hearst Publications, Inc.*, 322 U.S. 444, 430-31 (1944) [citations omitted]. Especially when the contested interpretation implicates an explicit provision in the governing statute, we accord limited deference.

Id. at 1357-58. Consistent with the reasoning of the Second Circuit court, this Court should give limited deference to the Petitioner's proof scheme for dual motive actions.

Under its judicial authority to interpret and construe statutes, the Second Circuit court next focused on the plain meaning of Section 10(c) and concluded that "[t]he plain language of the statute indicates that the General Counsel must prove by a preponderance of the evidence that the employer violated the Act". *Id.* at 1359. In line with the position taken by the Respondent, (Resp. Brief 21-22) the court found the Board's *Wright Line* test at odds with traditional evidentiary principles. *Id.* at 1359-60. Referring to Deans Wigmore and McCormick, Judge Timbers averred:

> [T]he ultimate burden of persuasion rests with the party that must convince the trier of fact at the end of a trial as to the outcome determinative issue - in this instance, the "real" motivation for the discipline. (citations omitted) Under the Board's *Wright Line* test, the General Counsel has to demonstrate only that the unlawful motive was a "motivating factor" in the discipline, not that the unlawful reason was the "but for" cause. If the unlawful "motivating factor" element is shown and the employer then fails to prove by a preponderance of the evidence that its independent lawful motive was the "but for" cause, then the Board would find the employer violated the Act . . . Pursuant to [the Board decision] *Wright*

> *Line*, any case resting in equipoise would result in finding the employer guilty of an unfair labor practice, a result plainly at odds with the statute."

(citations omitted) *Id.* at 1359-61.[4]

The *N.Y.U. Medical* decision thus confirms the stance taken by the Respondent, as well as by the First Circuit court, that the employer need not carry the overall burden of proving itself "innocent" of violating the statute. Resp. Brief 20, 22, 21 n.13; *NLRB v. Transportation Management Corp.*, 674 F.2d 130, 132 (1st Cir. 1982) (Breyer, J. concurring). Rather, the employer need only produce evidence that its reasons for the discharge or discipline were motivated by lawful management objectives (Resp. Brief 5, 22).

Turning to the legislative history of the Act, the Second Circuit court also provided fresh insight into the Congressional intent behind the enactment of Section 10(c). Going beyond the plain meaning of the statute, the court found that the House committee members in 1947 were especially concerned that the Board act upon a preponderance of the evidence in proving unfair labor practice violations. Slip. op. at 1361-63.

> Members of the House apparently wished to prod the Board to articulate its reasons for reinstating an employee and thus ensure that meaningful appellate review would be possible. In too many cases, the Board had presented its conclusion of discriminatory discharge without analyzing why the illegitimate motive was the *real* reason for the discipline. (citations omitted) *Id.* at 1362; *see also* Resp. Brief at 21, n.12.

Moreover, in accordance with the Respondent's position, the Second Circuit court discredited the Board's reliance on the

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[4] Finding the employer liable for an unfair labor practice any time the evidence rests in equipoise, appears to ressurect the "in part" test, a test presumably abrogated by the Board in its own *Wright Line* decision. 251 N.L.R.B. 1083, 1089 (1980) ("but for" test adopted to alleviate "intolerable confusion in Section 8(a)(3) area); *see* Brief of Council on Labor Law Equality, Amicus Curiae at 22; Resp. Brief at 7 (description of "in part" test).

Taft-Pepper colloquy on Section 10(c) as support for the proposition that the burden of proof shifts to the employer in dual motive actions. Slip. op. at 1363-1367; 1368 n.13; *see* Resp. Brief 23-25; 24 n.15. *But see Zurn Industries v. NLRB*, 680 F.2d 683, 693 (7th Cir. 1982). Although the Board has repeatedly relied upon Senator Taft's comment that the "employer has to make the proof" in support of its burden-shifting analysis (Pet. Brief 20-22, 21 n.11), it is not clear that Congress intended to shift the burden of persuasion onto the employer.

> Although the debates are by no means conclusive, no clear intent to shift the ultimate burden of persuasion is manifest. Senator Taft's comment that "the employer has to make the proof" does not at all suggest that the burden of persuasion shifts; if anything, it may be understood to discuss something more akin to a burden of production. That reading is plausible in view of the Senator's next statement, "[t]he Board will have to determine - and it always has - whether the discharge was for cause or for union activity, and the preponderance of the evidence will determine that question." (citations omitted) Under Senator Taft's view, after the General Counsel's prima facie showing of unlawful motivation and the employer's countervailing demonstration of legitimate motive, the Board must determine the real reason by a preponderance of the evidence . . .

Slip. op. at 1367; *see also* Resp. Brief 26 n.15.

The court then concluded that "the legislative history does not so undermine the plain language of § 10(c) as to allow the Board to shift the burden of persuasion to the employer." *Id.* at 1367-68.[5]

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[5] In a footnote, the court weakened the Board's reliance on the *Mt. Healthy* decision by distinguishing it as a decision of constitutional dimension. Slip. op. at 1367-68 n.12. The court also referred to the *Burdine* case and the Title VII area in support of its position that the burden of persuasion should not shift to the employer. *Id.*

Conclusion.

Based upon the reasoning of the Second Circuit court's *N.Y.U. Medical* decision, the plain language of Section 10(c) prohibits shifting the burden of persuasion to the employer in dual motive actions under Section 8(a)(3). Pursuant to its recent decision, the Second Circuit court now joins the First, Third, and Seventh Circuit Courts of Appeals in rejecting any effort by the Board to impose a burden of persuasion on the employer. Instead, the "General Counsel [must] prove each unfair labor practice by a preponderance of the evidence." Slip. op. at 1357, *citing NLRB v. Webb Ford Inc.*, 689 F.2d 733, 739 (7th Cir. 1982); *Behring International, Inc. v. NLRB*, 675 F.2d 83, 87-91 (3d Cir. 1982); *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 662 F.2d 899, 902-05 (1st Cir. 1981).

This Court has recently stated that: "going behind the plain language of a statute in search of a possible contrary Congressional intent is 'a step to be taken cautiously' even under the best of circumstances." *American Tobacco Co. v. Patterson*, ____ U.S. ____, 102 S.Ct. 1534, 1540 (1982) citing *Piper v. Chris Craft Industries, Inc.*, 430 U.S. 1, 26 (1977).[6] Since the Petitioner's *Wright Line* test is at odds with the plain language of Section 10(c), the Court should reject the Petitioner's construction of the statute. This result mandates a

[6] Justice Frankfurter has cautioned: "We must be wary against interpolating our notions of policy in the interstices of legislative provisions." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 11 (1942). By analogy, the Petitioner has erred in its burden of proof test by injecting its own notions of NLRA policy into the "interstices" of Section 10(c).

finding by this Court that the burden of persuasion never shifts from the General Counsel to the employer in dual motive actions arising under the Act.

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Office - Supreme Court, U.S.
FILED
MAR 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-168

In the Supreme Court of the United States

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TRANSPORTATION MANAGEMENT CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent and its amici (hereinafter "respondent") employ various phrases in an imprecise manner that apparently is designed to give the impression that the Board's *Wright Line* test violates traditional principles of proof and applicable statutory standards. But respondent's statements do not accurately express the Board's test. For example, respondent contends that under its *Wright Line* test the Board may find a violation of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), without identifying the "true reason" or "real motive" of an employer in discharging an employee;[1] but, in fact, the test at issue here applies only in cases in which the Board has concluded that a preponderance of the evidence shows that

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[1]See, *e.g.*, Resp. Br. 19, 28; Chamber of Commerce Br. 7, 10.

an employer had at least two "real motives."[2] Respondent's assumption that there can be only one "real motive" is an oversimplification that applies only to a "pretext" case (not at issue here), not to a "dual motive" case like this one.

Respondent also contends that under the Board's *Wright Line* test the employer loses when "the evidence is in equipoise."[3] The natural response to this contention is, "evidence of what?" Respondent does not identify the issue on which evidence is presented or why it views evidence as in "equipoise" at a certain point. Likewise, at several points respondent refers to the "burden of persuasion" and the "preponderance of the evidence" without explaining the issues to which those terms should apply.[4] Respondent's casual use of phrases does not advance the analysis, but only tends to mischaracterize the Board's test.

2. In our opening brief we explained the manner in which proof is made in a dual-motive case before the Board in an effort to clarify the misunderstanding reflected in the decisions of the courts of appeals that have rejected the Board's *Wright Line* test.[5] However, the briefs of respondent and its amici repeat the same misconceptions that we attempted to dispel. Thus, we believe it appropriate to summarize again the process of proof under the Board's *Wright Line* test. In this connection, it is worth recalling that reference to shifts

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[2]Accordingly, the Chamber of Commerce errs in formulating the question at issue (Chamber of Commerce Br. 6) as "[w]ho shall prevail if, after presentation of all the evidence, the employer's action could have resulted equally from lawful or unlawful motivation."

[3]See, *e.g.*, Chamber of Commerce Br. 10, 11, 16; Council on Labor Law Equality ("COLLE") Br. 5, 49.

[4]See, *e.g.*, Resp. Br. 5, 14; Chamber of Commerce Br. 6, 7, 10.

[5]Since our opening brief was filed the Second Circuit has joined those courts of appeals that have rejected the Board's *Wright Line* test. See *NLRB* v. *New York University Medical Center*, No. 82-4137 (Jan. 21, 1983).

in the burden of persuasion does not signify the order in which the parties introduce evidence during a proceeding; rather, it refers to the manner in which the decision-maker evaluates the evidence once all of it has been presented and it is time for a decision. See *McCormick on Evidence* § 336, at 784 (Cleary ed. 1972).

During a typical Board proceeding both the Board's General Counsel and the employer introduce evidence. Normally, the General Counsel will attempt to show that the employer disciplined or discharged an employee for an unlawful reason (*i.e.*, animus toward an employee's union activity or other protected activity) and that the employer's proffered legitimate reasons for its action are pretextual. The employer will offer evidence to rebut the General Counsel's evidence that it acted on the basis of an improper motive and may attempt to establish an affirmative defense. The employer's evidence may include testimony that rebuts directly the General Counsel's evidence of unlawful motive, and it may also include evidence that the employer acted for a lawful motive. The evidence of a lawful motive can serve two purposes: first, it can help rebut the General Counsel's evidence that the employer acted for an unlawful motive; second, if the employer does not succeed in rebutting the General Counsel's evidence of unlawful motive, the employer can use the evidence of a lawful motive to establish an affirmative defense, *i.e.*, that it should not be held liable for a violation of the Act even if it had an unlawful motive, because it would have taken the same action in the absence of the protected activity.

After both parties have submitted their evidence, the decision-maker, initially an Administrative Law Judge ("ALJ"), considers the evidence. First, the ALJ determines whether the General Counsel has established by a preponderance of the evidence that the employer acted for an unlawful reason. At this stage the ALJ considers both the

General Counsel's evidence of unlawful motive and all of the employer's evidence that would tend to rebut the existence of an unlawful motive, including evidence of any lawful motive. If the "evidence is in equipoise" on the issue of unlawful motive, the General Counsel has not met his burden of proof, and the employer prevails. If the General Counsel succeeds in showing by a preponderance of the evidence that the unlawful reason was a motivating factor in the employer's action, and also that the employer's asserted lawful motive is a pretext, then the General Counsel prevails, since he has shown that there was only an unlawful motive for the dismissal. However, if the General Counsel succeeds in showing by a preponderance of the evidence that the unlawful reason was a motivating factor in the employer's action, but is unable to disprove the existence also of a lawful motive, then the ALJ moves to a second stage of analysis.[6] The aspect of the Board's *Wright Line* test that is at issue here involves only this third category of cases, in which the preponderance of the evidence establishes that the employer has two "real motives," thus requiring the ALJ to move to a second stage.

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[6]The Board's statement in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083, 1089 (1980), enforced, 662 F.2d 899, (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), that the General Counsel must make a "*prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" must be read in the light of its earlier statement that it did not intend by adopting the *Mt. Healthy* burden-shifting procedure to depart from "the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence" (251 N.L.R.B. at 1088 n.11). Thus, what the Board refers to as the General Counsel's "prima facie" showing of unlawful motive involves consideration not only of the evidence introduced by the General Counsel, but also of any employer evidence that tends to disprove the existence of an unlawful motive. In the initial stage of analysis the General Counsel must meet a "burden of persuasion" on the issue of the existence of unlawful motive. As we stressed in our opening brief, the General Counsel's "prima facie" case is not equivalent to the "prima facie" case of the Title VII plaintiff under *Texas Department of Community*

At the second stage the Board gives the employer the opportunity to avoid a finding of a violation by establishing as an affirmative defense that it would have dismissed the employee for the legitimate reason, even in the absence of the employee's protected activity.[7] The inquiry at this stage is designed not to identify the "real motive"—it has been established in the initial stage of proof that there were at least two "real motives"—but to answer the question of what the employer would have done in a hypothetical situation. As we show in our opening brief, longstanding Board practice and express congressional approval support the Board's decision in *Wright Line* to place the burden of persuasion on the employer in this hypothetical inquiry —which is consistent with the normal practice for establishing an affirmative defense. The result is not that the

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Affairs v. *Burdine*, 450 U.S. 248 (1981). Rather, it amounts to the proof of discriminatory motive the Title VII plaintiff must make at the end of the third step described in *Burdine*. Thus, the argument that the Board should employ the *Burdine* approach following the General Counsel's showing (see, *e.g.*, Chamber of Commerce Br. 11-18) simply does not make sense.

As the description in the text and the cases cited at page 31 note 19 of our opening brief indicate, respondent is wrong in stating that the General Counsel is required to show only an employee's participation in protected activity (Resp. Br. 14). In addition, the statement of amicus curiae Council on Labor Law Equality (COLLE Br. 21) that "before the employer is ever called upon to produce evidence, both the Board and amicus [AFL-CIO] assume that liability has been resolved against him" is plainly inaccurate. Nor is the Chamber of Commerce correct in describing the General Counsel's prima facie case as a "rebuttable presumption" (Chamber of Commerce Br. 20).

[7]Amicus curiae AFL-CIO suggests that in fact a violation has been proved at the first stage of the inquiry, in which the General Counsel proves the existence of an unlawful motive by the preponderance of the evidence, and that the second stage of the inquiry really addresses the question of remedy (AFL-CIO Br. 4, 9-12). We believe that under the statute the Board could have chosen this approach. However, the Board has elected to permit the employer to avoid a finding of a violation altogether if it can establish the affirmative defense. The Board's choice

employer bears the burden of disproving the elements of a violation of the Act or that the General Counsel has been freed of his burden of persuasion. The General Counsel has been found to have carried the burden of persuasion at the earlier stage of inquiry, at which he was required to show by a preponderance of the evidence that the employer had an unlawful motive for dismissal of the employee. Thus, the Board's *Wright Line* test is fully consistent with traditional principles of proof and the statutory standards cited by respondent.[8]

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of the latter approach rather than the one advocated by the AFL-CIO cannot affect its ability to allocate the burden of proof on various issues in a manner that is sensible and that has been approved by Congress.

The AFL-CIO also suggests (AFL-CIO Br. 24-25) that this case should be remanded to the Board because it is unclear whether the Board concluded by a preponderance of the evidence that Santillo's discharge was motivated by his union activity. However, as the AFL-CIO points out (AFL-CIO Br. 25 n.20), the ALJ found that "a preponderance of the evidence establishes that [respondent's] decision to discharge Santillo * * * was motivated by a desire to discourage union activities" (Pet. App. 39a) and that "[respondent] would not have fired Santillo * * * but for his Union activities" (*ibid.*). We believe it is clear that the Board adopted those findings (see Pet. App. 10a-13a) and that a remand therefore is unnecessary.

[8]Contrary to respondent's contention (Resp. Br. 23-27), the legislative history of Section 10(c) of the Act, 29 U.S.C. 160(c), is not ambiguous on the issue of burdens of proof. The colloquy between Senators Pepper and Taft (Resp. Br. 24-27 n.15) makes clear that they were talking about placing on the employer the burden of persuasion, and not merely a burden of production, to show that an employee discharged for cause. Senator Taft stated that the conference report required the employer "to make the proof," which was "the present rule and present practice of the Board." As shown in our opening brief (at 14-16), under the Wagner Act an employer whose action was shown to have been motivated by unlawful considerations had the burden of persuasion on the issue of whether the employee would have been discharged for cause in any event.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 1983

DOJ-1983-03

Office-Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-168

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Supreme Court of the United States

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Petitioner,

v.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 99 national and international unions with a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises out of an unfair labor practice charge filed by Teamsters Local 404 contending, *inter alia*, that the respondent had violated §§ 8(a)(1) & (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) & (3) ("NLRA" or "the Act"), by discharging one Sam Santillo. Santillo was fired within a week after he had initiated an organizing campaign seeking to have the

union designated as the bargaining representative for respondent's employees. The record here contains ample evidence from which a trier of fact could find that Santillo's union activity was at least one of the reasons that had motivated respondent to discharge him. The record also indicates that Santillo had engaged in certain conduct, not protected by the Act, which might have provided a basis for discharge.

At issue here is the proper allocation of the burden of persuasion on the various issues that arise in a case of this type.[1] The National Labor Relations Board ("NLRB" or "the Board") and the First Circuit have developed conflicting rules for allocating that burden; it is our submission here that neither the Board's nor that court's rules accord with Congress' intent.

In *Wright Line*, 251 N.L.R.B. 1083 (1980), *enf'd on an alternate ground*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989, the NLRB adopted for such cases what the Board termed "an analysis akin to that used by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)." 251 NLRB at 1083. As described by the Board that analysis is as follows:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the

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[1] To avoid any possible confusion, it should be clearly stated at the outset what is *not* at issue here. No question is presented in this case as to the quantum of evidence sufficient to support a finding that union activity was a motivating factor in a discharge decision, or as to the circumstances in which such a motivation may be inferred from evidence before the Board. Those issues are important —and complicated—in their own right, but they are not raised here. The Board made no finding as to whether union activity was a motivating factor in the instant discharge, and the First Circuit expressed no opinion as to whether the evidence would be sufficient to support such a finding were it to be made. And, in any event, the evidence here plainly would justify such a finding on any likely legal standard. *See* n.20, *infra*.

> inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. [251 N.L.R.B. at 1089]

Wright Line was appealed to the First Circuit which "disagree[d] with the Board," 662 F.2d at 904, and staked out the following alternative position:

> The Board may properly provide . . . that 'Once [a *prima facie* showing] is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.' The 'burden' referred to, however, is a burden of going forward to meet a *prima facie* case, not a burden of persuasion. . . .[9]

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[9] . . . Let there be no mistake here either. The burden of persuasion *on all issues of disputed fact* rests at all times with the general counsel.

[*Id.* at 905 & n.9 (citations omitted; emphasis added)]

In the instant case, the Board and the First Circuit adhered to their respective positions. The Board found "that the General Counsel has established by strong and credible evidence a *prima facie* case for finding that Santillo was discharged in violation of Section 8(a)(3)" (Pet. App. 12a) and that "Respondent has failed to meet its burden of *overcoming* the General Counsel's *prima facie* case by establishing by competent evidence that Santillo would have been discharged, even absent his union activities" (*id.* 13a; initial emphasis added). The First Circuit regarded these findings as insufficient since, in its view, the Board may "impos[e] upon the Company [only] the burden of *neutralizing* . . . the General Counsel's *prima facie* case" (*id.* 3a; emphasis in original). Thus, the First Circuit "remand[ed] this case to the Board for reconsideration under the standard of [the First Circuit in] *NLRB v. Wright Line, supra,*" (*id.*).

Although the disagreement between the Board and the First Circuit which gives rise to the instant case is phrased in highly technical terms, the proper resolution of the controversy, as we show, requires a decision on a fundamental substantive question under the NLRA: what constitutes a violation of § 8(a)(3)? For while the First Circuit is correct in asserting that the burden of persuasion to establish a violation of the Act is at all times placed on the General Counsel, it is our submission here that the Board and the First Circuit each has erred by blurring—and thereby treating in a unitary fashion—two issues which, as *Mt. Healthy* recognizes, are analytically distinct. *See* Part A *infra*, pp. 5-9.

The first issue—the factual issue of "what happened" (*viz*, was an improper consideration in fact a "motivating factor" in the discharge decision)—is determinative of whether a § 8(a)(3) violation occurred; on that issue the burden of persuasion is on the General Counsel. But, as we demonstate, the second issue—the hypothetical question of "what would have happened" (*viz*, would the employee have been discharged if the improper consideration had not entered into the decision)—is purely a remedial issue, one whose resolution determines the propriety of the remedies of reinstatement and backpay; on that issue the burden of persuasion is properly placed upon the employer. *See* Parts B and C *infra*, pp. 9-24.

In our view, then, both the Board and the First Circuit have improperly allocated the burden of proof in cases of this type. The Board has erred by holding that on the first issue the burden of persuasion shifts to employers once the General Counsel has made a "*prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision"; thus, in this case the Board found a § 8(a)(3) violation without finding that a preponderance of the evidence supports the inference that Santillo's union activity was a motivating factor in his discharge. And the First Circuit has erred by holding that the Gen-

eral Counsel bears the burden of persuasion not only on this liability issue but also on the subsequent remedial issue of whether the employee should be denied the normal remedy of reinstatement with backpay because the employee would have been discharged even if he had not engaged in the protected conduct. Therefore, while we agree with the First Circuit that a remand is appropriate here, that remand should only be for the Board to determine whether the General Counsel carried its burden on the liability issue (and not, as the First Circuit has directed, for such a determination on both issues). *See* Part D *infra*, pp. 24-25.

ARGUMENT

A. The Lessons of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274

Because the Board based its *Wright Line* decision on this Court's *Mt. Healthy* decision—stating that it was "adopti[ng] the *Mt. Healthy* test," 251 N.L.R.B. at 1089—and because the First Circuit in *NLRB v. Wright Line* agreed that *Mt. Healthy* "presented issues . . . very similar to those raised in the labor context," 662 F.2d at 903, analysis here appropriately begins with *Mt. Healthy*.

Mt. Healthy was brought by a discharged public school teacher who had been given several reasons for his discharge, one of which was that the teacher had furnished information concerning the school's operations to a radio station. Plaintiff contended that his disclosure of the information was protected by the First Amendment and that therefore his discharge was unconstitutional; plaintiff sought reinstatement (with backpay) as a remedy for the alleged wrong.

The *Mt. Healthy* Court began by agreeing with plaintiff that his "communication was protected by the First and Fourteenth Amendments." 429 U.S. at 284. The Court concluded, however, that plaintiff was not necessarily entitled to reinstatement, reasoning that plaintiff should not be

> "place[d] . . . in a better position as a result of the exercise of the constitutionally protected conduct than he would have occupied had he done nothing. . . . The constitutional principle at stake is sufficiently vindicated if [plaintiff] is placed in no worse a position than if he had engaged in the [protected] conduct." [*Id.* at 285-86.]

Thus, if "quite apart from such [protected] conduct [his] record was such that he would not have been rehired in any event," *id.* at 286, plaintiff was not entitled to reinstatement.

The Court then announced the following rule governing the allocation of the burden of proof:

> Initially, in this case, the burden was properly placed upon respondent [plaintiff] to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. [*Id.* at 287]

The *Mt. Healthy* opinion does not expressly develop the underlying reasons for so allocating the burden of proof. But the context provided by other decisions of this Court leaves little in the way of doubt as to the basis on which that rule rests.

Just a few years before *Mt. Healthy* was decided, the Court, in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), another case involving the discharge of a public employee, explained the import of the First Amendment for public employee discharges. The Court stated:

> [E]ven though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government

> may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible. [Citations omitted]

The essence of the constitutional violation alleged in *Mt. Healthy* was that the School Board had acted upon one of those "reasons upon which the government may not rely." The burden of persuasion was placed upon the plaintiff on this issue because in any civil case the plaintiff bears the burden of proving that a wrong has occurred. And this burden on the plaintiff never shifts. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), *quoting* 9 J. Wigmore, Evidence § 2489 (3d ed. 1940) ("the burden of persuasion 'never shifts'").[2]

Once the plaintiff proved in *Mt. Healthy* that the School Board had acted on an impermissible basis, under *Perry* the plaintiff had established a constitutional wrong. The remaining inquiry—whether the same decision would have been made absent the impermissible consideration—is of a different nature: an inquiry not into what had in fact happened but into what would have

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[2] *Burdine* is entirely consistent with *Mt. Healthy*. *Burdine*, a Title VII case, dealt with the first issue that arises in an employment discrimination case, a First Amendment case or a § 8(a)(3) case: whether the challenged decision was impermissibly motivated. *Burdine* teaches that on that issue, which is determinative of whether a wrong occurred, the burden of persuasion is on the plaintiff and never shifts. But *Burdine* does not hold that the burden of persuasion must be placed upon the plaintiff with respect to remedial issues that arise only after the plaintiff carries his burden of persuasion and establishes a wrong.

happened had the School Board not acted on an improper consideration. That inquiry was undertaken to determine whether the remedy of reinstatement is necessary to put plaintiff in the position he would have occupied but for the constitutional violation or whether, instead, that remedy would give plaintiff a windfall. In *Mt. Healthy's* words, resolution of the "but for" question is required to decide whether the discharge "amount[ed] to a constitutional violation *justifying remedial action*." 429 U.S. at 285 (emphasis added).[3]

Given *Mt. Healthy*'s understanding that the issue whether the plaintiff would have been discharged absent his protected conduct is a remedial issue, it is not surprising that the Court placed the burden of persuasion on the defendant on that issue. For it is well-established in this Court's jurisprudence that "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946). *See also Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931). And that principle requires that a defendant who has acted upon a constitutionally impermissible consideration in discharging an employee (and thus has committed a wrong) bear the burden of persuasion—or the risk of nonpersuasion—on whether the same decision would have been made absent the impermissible consideration (and thus whether the remedy of reinstatement is appropriate).

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[3] Significantly, in deciding that the remedy of reinstatement would not be required if the teacher would have been discharged in any event, the *Mt. Healthy* Court relied on a series of criminal law decisions in which a constitutional violation (e.g., an illegal arrest) had been established (or assumed) and in which the question—plainly one of remedy—was whether that violation had "tainted" a subsequent event such as a confession or a guilty plea so as to require suppression of the confession or plea. 429 U.S. at 286.

Mt. Healthy teaches two critical lessons. First, a constitutional violation is established if a public employer in fact acts upon an improper consideration, and the plaintiff bears the burden of so proving. Second, even if the plaintiff carries that burden, the remedy of reinstatement is not proper if the same decision would have been made in any event, and the defendant bears the burden of so proving.[4] As we now show, these lessons—which neither the Board nor the First Circuit has fully comprehended—are equally applicable in the NLRA context.

B. The Pre-*Wright Line* Law on Mixed-Motive Discharges Under the Wagner Act and the Taft-Hartley Act

Extended analysis is not required to show that in this § 8(a)(3) discharge case, as in a First Amendment case, proof that the employee's protected activity was a motivating factor in the discharge is necessary to establish a violation.[5] This Court long ago recognized that "[t]he Act permits a discharge for any reason other than union

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[4] The Court has applied these principles in several other contexts. *See, e.g., Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265-66, 270-71 n.20 (1977) (Equal Protection Clause); *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 403 n.9 (1977) (Title VII; dictum) (if plaintiffs prove that their employment applications were rejected for racially discriminatory reasons, "the company was entitled to prove . . . that the [plaintiffs] had not been injured because they were not qualified and would not have been hired in any event"). *Cf. Carey v. Piphus*, 435 U.S. 247, 260 (1978).

[5] We use the phrase "motivating factor" here in the same sense that it was used in *Mt. Healthy* and *Arlington Heights*. For union activity to be a motivating factor in a decision, the activity must not only be "on the minds of those responsible for the decision" but also must "play a part in that decision," *Mt. Healthy*, 429 U.S. at 285. But union activity—like any other consideration—can be a "motivating factor" even if it was not the " 'dominant' or 'primary' " reason for the decision. *Arlington Heights*, 429 U.S. at 265. *See also* n.1 *supra*.

activity or agitation for collective bargaining with employees." *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937). Thus, in a case like this, unless an employee's union activity is proven to have, in fact, been a motivating factor in the employer's decision to discharge the employee, there is no basis for finding the discharge violative of § 8(a)(3).

Because proof of this fact is thus required to establish a violation of § 8(a)(3), it necessarily follows that the General Counsel must bear the burden of persuasion on the issue just as the plaintiff does under *Mt. Healthy*. As Judge Breyer stated in his concurring opinion below, "that the employer wins in a case where the record cannot be fairly said to make out a violation by a preponderance of the evidence . . . is surely what one would expect" (Pet. App. 5a). And § 10(c), 29 U.S.C. § 160(c), makes this requirement explicit by providing that the Board is to find a violation only "[i]f upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice," and that "[i]f upon the preponderance of the evidence, the Board shall not be of [that] opinion, then the Board shall . . . dismiss[] the . . . complaint."[6]

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[6] To be sure, the burden of *production* on the issue whether union activity was a motivating factor for the discharge—as on any issue—may shift if the General Counsel, in his case-in-chief, makes out a *prima facie* case that the employer was so motivated. As stated in *Montgomery Ward & Co. v. NLRB*, 107 F.2d 555, 560 (7th Cir. 1939), if "the evidence adduced to support the complaint gives rise to an inference that is sufficient to support an order based on § 8(3) of the Act" it then is "up to the employer to give an adequate 'explanation of the discharge' even though the burden of persuasion remains on the Board. . . ." *See also e.g., F. W. Woolworth Co.*, 25 N.L.R.B. 1362, 1374 (1940), *enf'd*, 121 F.2d 658 (2nd Cir. 1941); *Phelps Dodge Corp.*, 28 N.L.R.B. 442, 480 & n.77 (1940); *Interlake Iron Corp.*, 33 N.L.R.B. 613, 636 (1941), *enf. denied*, 131 F.2d 129 (7th Cir. 1942); *Leyser Aluminum Co.*, 37 N.L.R.B. 839, 850 & n.6 (1942). But, as the First Circuit has correctly stated, the employer's burden, in such circumstances, is "merely [to] 'come for-

It is common ground here that proof that a discharged employee's union activity was a motivating factor in the discharge decision does not necessarily end the inquiry, and that a determination may also be required on a second question—one also addressed in *Mt. Healthy*: would the employer have made the same decision absent the union activity.[7] The Board and the First Circuit in *Wright Line* each viewed the answer to that question as determinative of whether a violation occurred. The Board and that court differed only as to whether this inquiry concerns an affirmative defense to liability (in which case

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ward with enough evidence to convince the trier of fact that under the circumstances, there is no longer a preponderance of evidence' " establishing such a motivation, *NLRB v. Wright Line*, *supra*, 662 F.2d at 904. If, at the conclusion of all the evidence, the General Counsel has not established by a preponderance of the evidence that the discharged employee's union activity was a motivating factor in the discharge, the complaint must be dismissed.

In recent years, a set of rules governing the shifting of the burden of production has become an established feature of Title VII disparate treatment litigation as well. *E.g.*, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *United States Postal Service v. Aikens*, No. 81-1044, the AFL-CIO, as *amicus curiae*, has questioned the utility of the rules that have been formulated in these cases for adjudicating whether race was a motivating factor of a challenged employment decision. But whatever the utility of the *McDonnell Douglas* rules may be in general, at least this much is clear: those rules were developed for, and apply to, cases in which the preponderance of the evidence shows that an employer has acted for legitimate or for illegitimate reasons but not for both; thus *McDonnell Douglas* culminates in an inquiry into whether proffered nondiscriminatory reasons for a challenged decision are pretextual. By their terms, then, the *McDonnell Douglas* rules do not apply to cases which involve a mixed-motive decision, in which a proffered justification may be neither pretextual nor the complete reason for the decision.

[7] The question is presented where—but only where—the evidence shows that a permissible factor also was a motivating factor in the discharge decision. *See University of California Regents v. Bakke*, 438 U.S. 265, 321-22 n.54 (1978) (Powell, J.).

the burden would be on the employer, as the Board held) or whether it was a necessary element of the General Counsel's case-in-chief (in which case the burden would be on the General Counsel, as the First Circuit held). Both the Board and the First Circuit have misconceived the issue.

The hypothetical question as to what the employer would have done had he not been motivated, in part, by an anti-union animus is relevant not to determine whether a violation has occurred but whether the remedy of reinstatement is appropriate to cure the violation. Under § 8(a)(3), as under the First Amendment, there are certain reasons upon which the employer may not rely in making decisions and if the employer in fact does so rely he commits a wrong and may be subject to a cease-and-desist order enjoining such conduct regardless of whether there were legitimate bases upon which the employer might have reached the same decision had he not taken the impermissible factor into account. The latter question is relevant only in determining whether the remedy of reinstatement with backpay is appropriate to cure the wrong—if the employee would have been discharged even absent his union activity, reinstatement with backpay would give him a windfall. And because the issue of what would have happened but for the unlawful consideration of the employee's union activity is a remedial issue, the burden of persuasion here, as in *Mt. Healthy*, is properly placed upon the wrongdoing employer (who is seeking to avoid the remedy of reinstatement with backpay) to prove that the employee would have suffered the same injury in the absence of the wrong.

1. (a) *The Wagner Act.* Section 8(a)(3) was originally enacted by Congress in 1935 as § 8(3) of the Wagner Act. The sponsors of that Act explained the purpose of the section as follows:

> Of course, nothing in the bill prevents an employer from discharging a man for incompetence; from ad-

> vancing him for special aptitude; or from demoting him for failure to perform. But if the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work. [S. Rep. No. 573, 74th Cong., 1st Sess. 11]

Given this legislative intent (as well as the language of § 8(3) itself) it was evident from the very enactment of the Wagner Act that a discharge based solely on, e.g., "incompetence," does not violate § 8(3). It was equally obvious that a discharge of an employee solely because of union activity does violate the Act. The interesting question concerned "mixed-motive" discharges, *viz.*, discharges actuated by both proper and improper considerations.

(b) *The NLRB's 1935-1947 Decisions.* Almost immediately after the passage of the Act, the Labor Board, which Congress had created to administer the Act, confronted this question.[8] In one of its earliest decisions, *Consumers Research Inc.*, 2 N.L.R.B. 57, 73 (1936), the Board rejected an employer's argument that proof of a permissible purpose established the lawfulness of a discharge, stating:

> The Act does not provide that, antecedent to a finding of a violation of the Act, it must be found that

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[8] The same issue had arisen, prior to the enactment of the Wagner Act, under § 7(a) of the National Industrial Recovery Act. The National Labor Board, which administered the NIRA, had squarely held that an "employer, in dismissing an employee, must not be actuated *in any degree whatsoever* by the latter's union affiliation or activities." *General Cigar Co.*, Decisions of the Nat'l Labor Bd., Pt. 1, p. 71 (No. 163, Feb. 6, 1934) (emphasis added). *See also Cochran Shoe Co.*, 2 NRA Reporter 90 (Case No. 170, Feb. 16, 1933); *Carl Pick Mfg. Co.*, 1 Decisions of the NLRB 161 (No. 97, Nov. 10, 1934).

> the sole motive for discharge was the employee's union activity. Such an interpretation is repugnant to the purpose and meaning of the Act and . . . may not be made.

Two years later, in *Louisville Refining Co.*, 4 N.L.R.B. 844, 861 (1938), *enf'd*, 102 F.2d 678 (6th Cir. 1939), *cert. denied*, 308 U.S. 568, the Board articulated the converse of this proposition, holding that so long as an anti-union animus was a "definite factor" in a discharge decision, a violation of § 8(3) is established regardless of what other factors may have entered into the employer's decision. Thus, by the time of its Third Annual Report, issued in 1938, the Board advised Congress (at p. 70):

> Where the employer has discharged an employee for two or more reasons and one of them is union affiliation or activity, the Board has found a violation [of § 8(3)].

The Board continued to so hold in a long line of subsequent decisions,[9] and to so state its holding in its annual reports.[10] The rule that emerged was quite clear: employer conduct violated § 8(3) if motivated "in whole *or in part*" by anti-union animus, *Walter Stover*, 15 N.L.R.B. 635, 642 (1939) (emphasis added), *enf'd*, 114

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[9] *See e.g.*, *Republic Creosoting Co.*, 19 N.L.R.B. 267, 293-94 (1940); *Lone Star Gas Co.*, 52 N.L.R.B. 1058, 1060 (1943); *Acme Evans Co.*, 24 N.L.R.B. 71, 90 (1940), *enf'd*, 130 F.2d 477 (7th Cir. 1942), *cert. denied*, 318 U.S. 772; *Union City Body Co.*, 69 N.L.R.B. 172, 186 n.18 (1946); *Phoenix Mutual Life Ins. Co.*, 73 N.L.R.B. 1463, 1478 (1947), *enf'd*, 167 F.2d 983 (7th Cir. 1948), *cert. denied*, 335 U.S. 845; *Fairmont Creamery Co.*, 73 N.L.R.B. 1380, 1385 (1947) *enf'd*, 169 F.2d 169 (10th Cir. 1948); *Walter Stover*, 15 N.L.R.B. 635, 642 (1939), *enf'd denied on other grounds*, 114 F.2d 513 (10th Cir. 1940); *Armour & Co.*, 25 N.L.R.B. 989, 1000 (1940). *See also* cases cited, nn.12-14, *infra*.

[10] *See* NLRB 4th Annual Report at 60 (1939); NLRB 5th Annual Report at 37, 38 (1940); NLRB 6th Annual Report at 45 (1941); NLRB 7th Annual Report at 46 (1942).

F.2d 513 (10th Cir. 1940), "whether or not the [employer] may have some other motive . . . and without regard to whether or not the [employer's] asserted motive was lawful," *The Dow Chemical Co.*, 13 N.L.R.B. 993, 1023 (1939), *enf'd*, 117 F.2d 455 (6th Cir. 1941). Proof of such other motives was "immaterial," *West Oregon Lumber Co.*, 20 N.L.R.B. 1, 27 (1940); *Carl L. Norden, Inc.*, 62 N.L.R.B. 828, 831 n.12 (1945), in determining whether § 8(3) had been violated, even where it was claimed that other motives—lawful ones—had been "*controlling*" in the decision at issue, *United Dredging Co.*, 30 N.L.R.B. 739 (1941) (emphasis added).

While thus broadly defining the scope of § 8(3)'s prohibition, the Board, in a series of cases, also recognized the relevance of an employer's claim that the discharged employee would have lost his job in any event for reasons unrelated to his union activity. These decisions were based on, and usually relied on, *NLRB v. Remington Rand, Inc.*, 94 F.2d 862 (2d Cir. 1938) (L. Hand, J.), *cert. denied*, 304 U.S. 576. There the employer, whose unlawful "refusal [to negotiate] was at least one cause of [a] strike," sought to avoid an order requiring reinstatement of the (unfair labor practice) strikers on the ground that the strike would have occurred even if the employer had not violated the Act. Judge Hand accepted the employer's premise that proof of that fact would defeat reinstatement. But Judge Hand concluded that since the employer's refusal to bargain was a wrong for which the employer was seeking to avoid a remedy, "it rested upon the tortfeasor"—that is, the employer—"to disentangle the consequences for which it was chargeable from those for which it was immune," of that fact would defeat reinstatement. But Judge *id.* at 862. Indeed, his choice of terms—one is a "tortfeasor" only after having been adjudged to have com-

mitted a tort—makes it manifest that Judge Hand viewed the "disentanglement" issue as a remedial issue not a substantive issue.[11]

The Board applied this same approach in § 8(3) cases in which the Board found a discriminatory discharge or a discriminatory refusal to reinstate following a strike, entertaining employers' claims that employees were not entitled to reinstatement and backpay because they would have lost their jobs in any event due to, *e.g.*, a decline in the employer's business,[12] a change in the employee's physical condition,[13] or the employee's misconduct.[14]

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[11] Judge Hand's reasoning paralleled the reasoning of this Court in *Story Parchment Co., supra*:

> Whatever of uncertainty there may be in this mode of estimating damages, is an uncertainty caused by the defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced. [282 U.S. at 565]

And Judge Hand's reasoning anticipated this Court's subsequent decision in *Bigelow v. RKO Radio Pictures, supra*, as well as the decision in *Mt. Healthy*.

[12] *E.g., Commonwealth Telephone Co.*, 13 N.L.R.B. 317, 332 (1939); *E. Hubschman & Sons, Inc.*, 14 N.L.R.B. 225, 240 (1939); *Idaho Refining Co.*, 47 N.L.R.B. 1127, 1133-34, *enf'd*, 143 F.2d 246 (9th Cir. 1944); *Wright-Hibbard Industrial Electric Truck Co.*, 67 N.L.R.B. 897, 908 n.15 (1947); *Reynolds Int'l Pen Co.*, 70 N.L.R.B. 932, 933 (1946), *enf. denied*, 162 F.2d 680 (7th Cir. 1947).

[13] *Salmon & Cowin Inc.*, 57 N.L.R.B. 845, 846 n.1 (1944), *enf'd*, 148 F.2d 941 (5th Cir. 1945).

[14] *Davis Precision Machine Co.*, 64 N.L.R.B. 529, 537 (1945); *The Life Ins. Co. of Virginia*, 65 N.L.R.B. 1140, 1157 (1946); *Robbins Tire & Rubber Co.*, 60 N.L.R.B. 440, 454 n.21 (1946). *See also Kokomo Sanitary Pottern Corp.*, 26 N.L.R.B. 1, 18 (1940).

Most of the decisions cited in nn.10-11 clearly indicate that the question of whether the employee would have lost his job in any event was being considered in order to determine what remedy to order, rather than to decide whether a violation had occurred. In a few of those decisions however, and in all the decisions cited in this

These early decisions by the agency charged with enforcing the Act are strong evidence of Congress' intent in enacting the Wagner Act.[15]

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note, the Board's understanding of the relevance of the inquiry is less clear.

The petition for certiorari in this case (at 11-12) cites several of these ambiguous Board decisions and reads them to hold that the fact that an employee would have lost his job in any event was an affirmative defense which, if proved by the employer, established that the employer was innocent of any wrongdoing (even though the employer had, in fact, acted upon an impermissible consideration in discharging the employee). We respectfully suggest that this is not the better reading of those cases. First, none of the cases cited in the petition questions in any respect the by then well-established rule that action motivated in part by union activity violated § 8(3)—a rule which is inconsistent with the "affirmative defense" hypothesis. Second, each of the cited cases relied on *Remington Rand* which is undeniably a remedy case and which places the burden of persuasion on the employer precisely because he was shown to be a "tortfeasor." And third, in several of the cases cited herein (including *Salmon & Cowin Inc., supra*, cited in the petition as well) the Board clearly indicated that the "but for" inquiry was a remedial, rather than a liability, issue.

There is only one decision by the Board during this era, *Eagle-Picher Mining & Smelting Co.*, 16 NLRB 727 (1931), *enf'd*, 119 F.2d 903 (8th Cir. 1941) which squarely treated the issue of whether the employee would have lost his job but for his union activity as an affirmative defense. (*Borden Mills, Inc.*, 13 NLRB 459 (1939), on which the petition for certiorari relies, does not; all that it states is that "[e]ven on the *supposition*" that the but for issue is a "defense," the employer had not satisfied his burden of proof. *Id.* at 475). In *Eagle Picher* the Board offered no explanation for so doing and it relied, 16 NLRB at 801, on the remedial discussion in *Remington Rand*. For the reasons just discussed, this decision is aberrational, not the norm.

[15] *See, e.g., Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933) (Cardozo, J.) ("a contemporaneous construction of the statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work effectively and smoothly while they are yet untried and new" is entitled to "peculiar weight"); *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961); *EEOC v. Associated Dry Goods*, 449 U.S. 590, 600 n.17 (1981).

(c) *The Taft-Hartley Act.* In 1947, Congress enacted the Labor Management Relations Act ("LMRA")—known as the Taft-Hartley Act—amending the Wagner Act in various respects. Significantly, however, Congress did not amend § 8(3)'s prohibition on discrimination but rather, reenacted that prohibition verbatim (as § 8(a)(3)); the section thus remains the product of the Seventy-Fourth Congress—the Congress responsible for the Wagner Act. There is not one word in the legislative history of the LMRA to suggest that in reenacting § 8(a)(3) Congress intended to alter its meaning nor is there any indication that Congress disagreed with the Board's repeated holding that the section is violated by employer conduct which is motivated in whole or *in part* by an anti-union animus.

To the extent that Congress expressed itself at all in 1947 on the subject of mixed motive discharges, it was in the consideration of amendments to the *remedial* section of the Wagner Act, § 10(c). The LMRA added the following sentence to § 10(c):

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

The Conference Committee which produced this language stated the purpose of the amendment as follows:

> [E]mployees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause will not be entitled to reinstatement. [H.R. Rep. No. 510, 80th Cong. 1st Sess. at 55, *reprinted* in 1 Leg. Hist. of the LMRA at 559]

That explanation, like the language and placement of the amendment, speaks to remedy not to violation. And

during a lengthy debate with Senator Pepper over the import of this amendment, Senator Taft, the floor manager of the bill, stated five separate times that the amendment "merely states the present rule," 2 Leg. Hist. at 1593, and that "there is no intention whatever to change the existing law," *id.* at 1594. *See also id.* at 1595.

(d) *The NLRB's Pre-*Wright Line *Taft-Hartley Decisions.* Following the enactment of the LMRA, the Board continued to hold that a discharge violated § 8(a)(3) if motivated in part by an improper consideration, as the Board acknowledged in *Wright Line.* 251 N.L.R.B. at 1084, 1087.[16] Those holdings are further evidence that Congress, in enacting that Act, had not intended to overturn the preexisting rules governing mixed-motive discharges. *See* p. 17 and n.15, *supra.*

2. In sum, for the forty-five years preceding *Wright Line*, the rules the Board applied in mixed-motive cases were analytically the same as the rules this Court eventually developed in *Mt. Healthy* and *Arlington Heights.* This parallel is not surprising. Determining whether an employer has commited a wrong, either under the First and Fourteenth Amendments or under § 8(a)(3),[17] requires an inquiry into the employer's motivation in taking the challenged action. That inquiry is complete when

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[16] Although not mentioned in *Wright Line*, the Board also continued to hold, after the enactment of the LMRA, that reinstatement would not be an appropriate remedy if the employer could prove that the employee would have been discharged without regard to his union activity. *E.g., Differential Steel Car Co.*, 75 N.L.R.B. 714, 730 (1948) *enf'd*, 179 F.2d 241 (6th Cir. 1949); *Western Union Telegraph Co.*, 83 N.L.R.B. 238, 239 (1949); *West Boylston Mfg. Co.*, 87 N.L.R.B. 808, 871 (1949); *Westinghouse Pacific Coast Brake Co.*, 89 N.L.R.B. 145, 146-47 (1950).

[17] *See, e.g., NLRB v. Jones & Laughlin Corp.*, 301 U.S. 1, 45 (1937); *Radio Officers Union v. NLRB*, 347 U.S. 17, 44 (1954); *NLRB v. Erie Resistor Co.*, 373 U.S. 221, 227 (1963); *NLRB v. Great Dane Trailers Inc.*, 388 U.S. 26 (1966); *NLRB v. Brown,*

it is found that the employer acted for an improper motive. The norm is that decision-makers do not, before acting, take a series of factors into account and then stop to evaluate each of those reasons for their decision to determine which of the reasons are necessary to the decision and which are surplusage. Thus, as we have stressed, the inquiry into what the employer would have done if he had acted free of the improper motivation that, in fact, actuated his action is, by its nature, a hypothetical inquiry rather than an attempt to determine what, in fact, occurred. Consequently, as *Mt. Healthy* teaches, that inquiry is not relevant in deciding whether the employer committed a wrong.

Indeed there is added reason, in the § 8(a)(3) context, to hold that an employer commits a wrong—and is subject at the least to a cease-and-desist order—by taking into account an improper consideration in making a decision. As this Court has held, the Labor Board exists "not for the adjudication of private rights" but to "act[] in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interestate commerce by encouraging collective bargaining." *National Licorice Co. v. Labor Board*, 309 U.S. 350, 362 (1940); *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 193 (1941). That public policy is offended when an employer acts for an improper purpose, whether or not the employer would have made the same decision in any event. Thus, it is peculiarly appropriate for the Board to vindicate the public policy embodied in the Act by issuing a cease-and-desist order against an employer who so acts, enjoining him from relying upon impermissible considerations in the future, regardless of whether

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380 U.S. 278, 286-87 (1965); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311 (1965); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 682 (1981).

the discharged employee would have suffered the same adverse employment consequence if the employer had not taken into account the impermissible factor.[18]

C. The Board's and First Circuit's *Wright Line* Decisions

1. In *Wright Line* the Board made a limited but important break with what is described, understatedly, as the rule the Agency had been following "[f]or a number of years," 251 NLRB at 1084. The Board in *Wright Line* held that even if a discharge is motivated in part by union activity, proof that the employee would have been discharged in any event constitutes a defense to a § 8(a)(3) charge (rather than simply a defense to the ordinary remedy of reinstatement).[19]

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[18] It has long been established in the Board's jurisprudence that a cease-and-desist order directed against a discriminatory discharge may issue even where reinstatement of the discharged employee is not an appropriate remedy. *See Phelps Dodge Corp. v. Labor Board, supra*, 313 U.S. at 194-95. Both the Board's and the First Circuit's *Wright Line* decisions, however, by blending the question of what motivated the employer with the question what would the employer have done absent an improper motive, leave little room for a determination that the employer acted improperly but that reinstatement is inappropriate as a remedy. Thus, in the post-*Wright Line* cases in which the Board has found that the employer carried its burden of persuasion on the question delineated in *Wright Line*, the Board has dismissed the complaint without regard to whether the employer had, in fact, been actuated by an improper motive. *Litton Mellonics Systems Division*, 258 N.L.R.B. No. 84 (1981); *Magnesium Casting Co.*, 259 N.L.R.B. No. 64 (1981); *St. Joseph Hospital Corp.*, 260 N.L.R.B. No. 89 (1982); *East Texas Motor Freight*, 262 N.L.R.B. No. 101 (1982); *Hillside Bus Corp.*, 262 N.L.R.B. No. 152 (1982); *Bodolay Packing Machinery Inc.*, 263 N.L.R.B. No. 38 (1982). Under the analysis developed herein, these decisions are erroneous insofar as dismissal of the complaint is ordered without regard to whether the employer, in taking the challenged action, had been motivated by an improper consideration.

[19] *See also Herman Brothers, Inc.*, 252 N.L.R.B. 848, 848 (1980); *Kawasaki Motors Corp.*, 257 N.L.R.B. 502 n.2 (1981).

As previously noted (pp. 2, 5 *supra*), the Board thought that it was adopting "the *Mt. Healthy* test" and justified its decision principally on that ground. But as we have seen, the Board's decision in *Wright Line* is inconsistent with *Mt. Healthy* by denominating the issue of whether the employee would have been discharged absent the impermissible consideration as a liability issue rather than a remedial one.

2. The First Circuit in *NLRB v. Wright Line*, *supra*, also held that this issue goes to liability (although the First Circuit disagreed with the Board's conclusion that the inquiry concerns an affirmative defense, viewing it instead as going to an element of the General Counsel's case-in-chief). Unlike the Board, however, the First Circuit recognized that it was departing from *Mt. Healthy* in so holding. The First Circuit's explanation for that departure cannot withstand analysis.

The First Circuit acknowledged that under *Mt. Healthy* a First Amendment violation is established by proof that protected activity is a motivating factor in the discharge decision, and that the question whether the protected activity was a "but for" cause of the discharge is a remedial one on which the employer bears the burden of proof:

> In *Mt. Healthy*, the employer conceded that he had fired the employee for speech activity which was later found to be fully protected under the first amendment. Thus, the "but for" test . . . applied only *after* . . . a violation had been proven by the employer's own admission. The employer's claim, then, was a true affirmative defense to a rehiring order—*i.e.*, the employer contended that notwithstanding his violation of the Constitution reinstatement was improper as a remedy because the employer had also been involved in an altercation with another teacher, an argument with cafeteria employees, and an incident in which he made obscene gestures to female students. The employer argued

> that these incidents, which were totally independent of the protected speech activity, justified the employee's dismissal *notwithstanding* the fact that the employer had violated the employee's constitutional rights. The employer's claim was thus a true affirmative defense which went to the appropriateness of the remedy being applied rather than to the existence of a violation in the first instance. [*NLRB v. Wright Line*, *supra*, 662 F.2d at 906 (emphasis in original; footnote omitted).]

The First Circuit also suggested that "on rare occasions" the same approach might be appropriate in a § 8(a)(3) case, if the employer "is not defending on the ground that the discharge was properly motivated, but rather on the theory that, notwithstanding the commission of an unfair labor practice, he should not have to take the particular person back." *Id.* at 906 n.11. But the First Circuit concluded that where the employer did defend the discharge as "properly motivated," the General Counsel bears the burden of proving not only that which was admitted in *Mt. Healthy* (and in the hypothetical case)—*viz.*, that an improper consideration was a motivating factor in the discharge decision—but also that which was disputed in *Mt. Healthy* and on which the burden was placed upon the employer—*viz.*, that the improper consideration was a "but for" cause of the discharge.

We are at a loss to understand the First Circuit's reasoning. That the employer denies an improper motivation means that the General Counsel must bear the burden of proving that the decision was based, in part, upon such motive. But if the General Counsel meets that burden the case then stands in the same posture as if the employer had admited the improper motivation. There is no reason to vary the allocation of the burden of proof on the *second* issue—the "but for" issue—because the

employer unsuccessfully defended on the *first* issue. The "but for" issue is either a remedial issue in all § 8(a)(3) cases or in none. And *Mt. Healthy* supports the former conclusion.

D. The Proper Outcome of this Case

While disagreeing with the First Circuit's analysis, we agree with that court that a remand is appropriate here. The Board's *Wright Line* test is not phrased so as to place on the General Counsel the ultimate burden of persuasion on the first issue; the Board requires only that the General Counsel make "a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" (pp. 2-3, *supra*). Once the General Counsel makes such a showing, he has no further burden under *Wright Line*, and the burden then shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct" (*id.*).

Thus, the Board here found a violation without expressly finding that Santillo's union activity was a motivating factor in his discharge; all that the Board found was that the General Counsel established, *prima facie*, that the union activity was a motivating factor, and that respondent failed to show that Santillo would have been discharged in any event (*see* p. 3, *supra*). The Board's findings leave open the possibility, however slight, that respondent had *neutralized* the inference of discrimination created by the General Counsel's *prima facie* case and that the evidence was in equipoise as to whether union activity was a motivating factor in Santillo's discharge.

Under the principle of *SEC v. Chenery*, 318 U.S. 80 (1943), therefore, a remand is appropriate here for the Board to decide whether the preponderance of the evidence proves that Santillo's discharge was based, at least

in part, upon his union activity.[20] If the Board were to so find, a violation of § 8(a)(3) would, perforce, be established, and based upon the findings the Board has made—that respondent did not prove that Santillo would have been discharged in any event—the remedial order the Board has issued directing reinstatement and backpay would be appropriate.

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[20] We hasten to add that the evidence here plainly would support such a finding and may, indeed, compel it (in which case a remand might not be required). Santillo, one of respondent's most experienced employees, was discharged within one week after he initiated the union organizing campaign, and within one working day after the manager who fired Santillo stated that he (the manager) was "going to get even with Santillo" (Pet. App. 19a-20a, 24a, 29a). Santillo was not given three written warnings before being discharged, even though it was the Company's practice to do so (*id.* at 38a); indeed, Santillo was not cautioned or admonished at all. Of the three reasons that were offered to justify Santillo's discharge, two—that Santillo took coffee breaks during work hours and that he left the keys to the bus he drove in the bus when parked in the garage—were found to be pretextual in that other employees who engaged in identical conduct were not discharged (or even told their conduct was improper). *Id.* at 25a-28a, 29a-31a. And the third ground—that Santillo stopped at his home during work hours—while not shown to be pretextual (because there was no evidence as to whether other employees had engaged in such conduct)—was closely akin to the practice of employees taking coffee breaks during work hours which the respondent permitted so long as the breaks did not interfere with the drivers meeting their bus schedules.

The Administrative Law Judge found that "a preponderance of the evidence establishes that [the manager's] decision to discharge Santillo . . . was motivated by a desire to discourage union activities" (Pet. App. 39a,; indeed, the ALJ found that "Respondent would not have fired Santillo, one of his most experienced employees, but for his Union activities' (*id.*) It is not clear from the Board's opinion, however, which "affirm[ed] the rulings, findings, and conclusions of the Administrative Law Judge, *as clarified herein*," (Pet. App. 10a-11a; emphasis added) whether the Board intended to affirm these specific findings in its decision.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated, and the case should be remanded to that Court, for remand to the Board, with instructions for the Board to decide whether the General Counsel has proven that union activity was a motivating factor in the discharge at issue here.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
FEB 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRANSPORTATION MANAGEMENT CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE RESPONDENT

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January 29, 1983

Pandick Press Midwest Inc., Chicago • 454-7600

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRANSPORTATION MANAGEMENT CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States (the "Chamber") is the largest federation of business organizations and individuals in the United States. Presently, the Chamber's membership consists of 245,000 corporations, partnerships, proprietorships and individuals, as well as 1,350 trade associations, and 2,700 local and state Chambers of Commerce.

One of the principle functions of the Chamber is to serve as spokesperson for its members. In this capacity, the Chamber

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[1] This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 36.

has regularly represented the interests of its members before the courts, the United States Congress, the Executive Branch, and the independent regulatory agencies of the Federal Government. In this regard, the Chamber has participated as *amicus curiae* in numerous cases before this Court.[2]

The issue presented here is whether the court below correctly concluded that the National Labor Relations Board (the "Board") erred in finding that the employer's discharge of an employee violated Section 8(a)(3) of the National Labor Relations Act (the "Act"), in view of the Board's requirement that, to avoid such a result the employer must overcome the General Counsel's *prima facie* case of unlawful motivation by establishing by a preponderance of the evidence that the employee would have been discharged even absent his protected activities. This issue is of vital concern to the Chamber and its members. Unless the First Circuit's decision is affirmed, employers' rights to discipline employees for reasons unrelated to protected conduct, rights protected by the Act and recognized by this Court,[3] will be substantially impaired. Necessarily, this Court's decision in this case will have a significant impact on the manner in which many Chamber members do business. It is for these reasons that the Chamber respectfully submits its views.

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[2] *See e.g., Metropolitan Edison Co. v. People Against Nuclear Energy, cert. granted,* 51 U.S.L.W. 3339 (U.S. Nov. 2, 1982) (Nos. 81-2399, 82-358); *First National Maintenance Corp. v. NLRB,* 449 U.S. 1076 (1981); *Northwest Airlines v. Transport Workers of America, AFL-CIO,* 447 U.S. 920 (1980); *Rockwell International Corp. v. City of New York,* No. 81-904, 102 S.Ct. 1038 (Jan. 11, 1982); *Weyerhaeuser Co. v. Lyman Lamb Co.,* Nos. 81-1618, 81-1619, 102 S.Ct. 2232 (May 17, 1982) (order granting petition to file *amicus*).

[3] *See NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45 (1937).

STATUTORY PROVISIONS INVOLVED

Section 7 of the Act, 29 U.S.C. 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Section 10(c) of the Act, 29 U.S.C. 160(c), provides in pertinent part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

Section 10(e) of the Act, 29 U.S.C. 160(e), provides in pertinent part:

> * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

Section 706(g) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. 2000e-5(g), provides, in pertinent part:

> * * * No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a), provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; * * *

SUMMARY OF THE ARGUMENT

The First Circuit, in remanding the case below for reconsideration under the standard of *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), *enforcing, Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083, correctly directed the Board to be governed by the evidentiary analysis set forth by this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

In unfair labor practice cases which turn upon the nexus between an employee's discharge and an employer's motive, the Board has correctly decided to evaluate the employer's true motive by a "but for" causation standard. The procedural framework established by the Board for determining "but for" causation, however, is inept. It completely fails to measure true motive. It also allows the General Counsel to prevail without having sustained its burden of proof. These failings render the Board's *Wright Line*[4] test inconsistent with the Act and the policies it promotes. The *Burdine* test cures these defects. Accordingly, this Court should affirm the lower court's ruling that the Board must apply *Burdine* to allocate the burdens in cases arising under the Act.

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[4] Hereinafter the Board case will be referred to as *Wright Line* and the First Circuit decision will be referred to as *NLRB v. Wright Line*.

ARGUMENT

THE FIRST CIRCUIT IN *NLRB v. TRANSPORTATION MANAGEMENT CORP.*, 674 F.2d 130 (1st Cir. 1982) CORRECTLY RULED THAT THE BOARD ERRED IN FINDING THAT AN EMPLOYER VIOLATES SECTION 8(a)(3) OF THE ACT IF THE EMPLOYER CANNOT ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT IT WOULD HAVE DISCHARGED THE EMPLOYEE FOR LEGITIMATE REASONS. IN REMANDING THE CASE FOR RECONSIDERATION UNDER THE STANDARD OF *NLRB v. WRIGHT LINE*, 662 F.2d 899 (1st Cir. 1981), THE COURT BELOW CORRECTLY DIRECTED THE BOARD TO BE GOVERNED BY THE EVIDENTIARY ANALYSIS SET FORTH BY THIS COURT IN *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS v. BURDINE*, 450 U.S. 248 (1981).

I. INTRODUCTION

The conflicting positions of the parties can be illustrated by the following question:

> Who shall prevail if, after presentation of all the evidence, the employer's action could have resulted equally from lawful or unlawful motivation?

Under the Respondent's theory, the employer would prevail, as the Board's General Counsel will have failed to sustain its burden of proof by a preponderance of the evidence. Under the Board's theory, it's General Counsel should prevail, as the employer will not have proven its absence of guilt by a preponderance of the evidence. The latter would be a result unique in American jurisprudence.

The Board's justification for its position, that the employer deserves such a burden because, after provoking a complaint, it best has access to proof of its innocence. This requires the respondent to prove its innocence rather than the General Counsel to prove respondent's guilt.

In these cases the discriminatory intent or "real motive" of an employer must be proven by the General Counsel.[5] On this point the parties are in agreement. The *amicus* submits that the analysis adopted by this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) is the proper procedural framework for determining the requisite intent within the constraints of the Board's Section 10(c) obligations. This *Burdine* analysis requires a ruling against the General Counsel when the evidence is in equipoise. The Board's proffered test, on the other hand, not only fails to identify the true motive, but also fails to require the General Counsel to prove its case by a preponderance of the evidence. The test posited by the *amicus* and the Respondent, unlike that put forth by the Board, is mandated by the Board's statutory and regulatory obligations, controlling case law and traditional principles of proof.

II. THE PROCEDURAL COMPONENT OF THE BOARD'S *WRIGHT LINE* TEST IS INCONSISTENT WITH THE SUBSTANTIVE TEST OF CAUSATION ADOPTED BY THE BOARD IN THAT SAME CASE.

A. In *Wright Line* the Board set forth the components of its substantive and procedural tests.

The test formulated by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980) has substantive and procedural components. *See, Behring International, Inc. v. NLRB*, 675 F.2d 83, 87 (3d Cir. 1982); and *NLRB v. Wright Line*, 662 F.2d 899, 903 (1st Cir. 1981).

> • • • *Substantively*, it analyzes the connection between an employee's discharge and an employer's antiunion animus in terms of "but for" causation. To find a §8(a)(3) violation, the Board must determine that the employee

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[5] *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 675 (1961).

> would not have been discharged but for his protected union activity. No violation exists if the employer would have made the same decision to discharge the employee in any event, absent the shielded conduct. (Emphasis added.)

Behring International, 675 F.2d at 87. Procedurally, the test analyzes the nexus between an employee's complained of treatment and an employer's motivation through the use of a burden shifting analysis. The Board

> first requires the General Counsel to make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line,* 251 N.L.R.B. at 1089. Once this is done, the burden shifts onto the employer to "demonstrate" that the same action would have taken place even in the absence of the protected conduct. *Id.* By "demonstrate," the Board means that the *burden of persuasion shifts to the employer, not merely the burden of going forward with evidence* to rebut the *prima facie* case.

Behring International, 675 F.2d at 88. (Emphasis added.)

B. *Wright Line's* substantive component, "but for" causation, is the correct measure of the nexus between an employee's discharge and an employer's motive.

In *Wright Line,* the Board acknowledged that in cases arising under Sections 8(a)(1) and 8(a)(3), an area fundamental to the Act, the decisions by the circuit courts and the Board reflected the disagreement and controversy over the correct measure of the nexus between an employee's discharge and an employer's motive. In an effort to put an end to the inconsistencies within its own decisions and to address the concerns of the various courts of appeals, the Board announced that "in all cases alleging a violation of Section 8(a)(3) or Section 8(a)(1) turning on employer motivation," it would apply to this area the test adopted by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle,* 429

U.S. 274 (1977). In discussing the applicability of *Mt. Healthy*, the Board noted the substantive similarity between the *Mt. Healthy* test and the "dominant motive" or "but for" test, and distinguished between them solely with regard to the process with which the burden of proof is to be allocated. The Board explained that, under the *Mt. Healthy test:*

> . . . after an employee or, here, the General Counsel makes out a *prima facie* case of employer reliance upon protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity. This distinction is a crucial one since the decision as to who bears this burden can be determinative.

Wright Line, 251 N.L.R.B. at 1087.

Uniform adherence to the "but for" causation test is a welcome development which should eradicate the confusion that has prevailed in this area of labor law.[6] Significantly, that test satisfies the Supreme Court's requirement that the Board ascertain the true reason for an employer's actions. This requirement is based upon this Court's reasoning that "[t]he Act does not interfere with the normal exercise of the right of an employer to select its employees or to discharge them. . .and. . . the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for reasons other than. . . intimidation and coercion." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937).

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[6] The courts and the Board, when confronted with so-called mixed motive cases have applied several different tests to determine whether the Act has been violated. Those tests have been characterized as "pretext", "dual motive", "in part" and "dominant motive" tests. *Wright Line*, 251 NLRB at 1083-85.

C. The procedural component of *Wright Line* fails to measure "but for" causation.

The procedural test posited by the Board, fails to measure "but for" causation and instead encourages return to pre-*Wright Line* confusion over arriving at motivation. That test provides that:

> [F]irst, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Wright Line, 251 N.L.R.B. at 1089.

Applying principles from *Mt. Healthy*, the Board has concluded that an employer violates Section 8(a)(3) if its hostility to an employee's protected activities is shown, by a preponderance of the evidence, *to be a motivating factor* in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate business reasons, absent his protected activities.

The flaws in the Board's analysis are readily apparent, for while the Board acknowledges the established concept that the General Counsel retains the ultimate burden to establish an unfair labor practice by a preponderance of the evidence (Board Brief at 29), this is impossible to reconcile with the practical results of the Board's test. Under that test, there is no doubt that when the evidence is in equipoise, the General Counsel prevails without any determination having been made as to the employer's true motive. As such, this framework does not measure "but for" causation and conflicts with the Board's obligation under Section 10(c) of the Act.

Having determined the impropriety of the Board's procedural analysis, the *amicus* now examines the analysis

proposed by the First Circuit following this Court's decision in *Burdine*.

III. The *Burdine* analysis rather than the Board's *Wright Line* framework measures discriminatory intent in terms of "but for" causation.

Since the Board correctly decided to measure discriminatory intent by "but for" causation, this Court should require that the procedural test utilized accomplish that purpose. The *Burdine* analysis should be the working guideline for the Board. That test was adopted by this Court to resolve the conflicts amongst the circuit courts[7] over the proper procedural framework to measure discriminatory intent in cases arising under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). It represents the culmination of this Court's considered thinking as to the proper means to measure motive, a concern as central to Title VII cases as it is to Section 8(a)(3) cases.[8] Moreover, this test measures motive in a manner that properly answers the very question before this Court of which party prevails when the evidence is in equipoise.

In *Burdine*, this Court readdressed[9] the issue of the burdens on each party in a Title VII case[10] involving a single

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[7] Cases evidencing the conflict at that time were *Kirby v. Colony Furniture Co.*, 613 F.2d 696 (8th Cir. 1980); *Ambush v. Montgomery County Government*, 620 F.2d 1048 (4th Cir. 1980); *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980); and *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

[8] This Court developed its thinking on the question of discriminatory intent in cases such as *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Furnco Construction Corp. v. Watersus*, 438 U.S. 567 (1978); and *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978).

[9] *See* cases cited *supra* note 8.

[10] *Burdine* involved a claim of sex discrimination in employment. The female plaintiff applied for a supervisory job in a division of the employer which remained vacant for six months after she applied.

(footnote continued on following page)

individual's claim of unlawful discrimination. In such cases, this Court has made it clear that a finding of specific intent to discriminate is required.[11] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This Court stated that in Title VII cases the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 890-91. at 1093. This Court recognized that intermediate burdens do shift back and forth between the parties. The first intermediate burden is on the plaintiff to establish by admissible evidence a *prima facie* case of discrimination. Once accomplished, the burden shifts to the respondent to produce evidence that its action was taken against the plaintiff for legitimate nondiscriminatory reasons. On this point, this Court made it clear that the burden placed upon the respondent was a burden to produce evidence, not a burden to persuade the Court that it was actually motivated by the proffered reasons. In clarifying this burden the Court explained that

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(footnote continued from previous page)
Subsequently, when the employer reduced its staff, the plaintiff was terminated. For its defense, the employer contended that the division's future funding from the United States Department of Labor was jeopardized because of its inefficiencies. In an effort to improve, the division and the employer agreed to fill the supervisory position and completely reorganize the division's staff. The supervisory position was filled as a result of consultation among the employer's trusted advisors and a nondiscriminatory evaluation of the applicants. The persons terminated did not work well together, and the employer thought eliminating this inefficiency would improve the division's efficiency.

[11] This is to be contrasted with so-called "discriminatory impact" cases in which this Court has held that discriminatory intent is not an essential element to be proven. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Only when the finder of fact is confronted with cases involving facially neutral practices that adversely affect the protected rights of a group of employees is a finding of intent unnecessary under either Title VII or the Act. *See Griggs* and *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

> * * * It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the *prima facie* case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's *prima facie* case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

Burdine, 450 U.S. at 890-91.

Once the employer satisfies its burden to neutralize the *prima facie* case, the plaintiff, having retained the burden of persuasion, must have the opportunity to demonstrate that the reasons proffered by the employer were pretextual. This burden merges with the ultimate burden of persuading the court that plaintiff was victimized by unlawful discrimination. The plaintiff

> * * * may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *See McDonnell Douglas, supra*, at 804-805, 93 S.Ct., at 1825-1826.

Id.

The *Burdine* analysis is well suited to achieve the Board's statutory mandate. First, it is a burden allocation test for assessing true motive, developed specifically for an area of the law which requires examination of respondent's dual motives or the assertion of pretextual reasons for an action. Second, it is a

test which rests the ultimate burden of persuasion upon the plaintiff. Third, when the evidence is inconclusive, the party with the ultimate burden of persuasion loses. These factors, together, insure that "but for" causation will be measured and done so in accordance with the parties' respective proof burdens.

IV. THE *BURDINE* ANALYSIS IS CONSISTENT WITH THE LANGUAGE AND POLICIES OF THE NATIONAL LABOR RELATIONS ACT.

A. As the *Burdine* analysis promotes employment policies identical to those protected by Sections 8(a)(1) and 8(a)(3) of the Act, its measure of intent should be applied to such cases.

Title VII promotes employment policies identical to those protected by the Act and is consistent with the Board's obligations under Section 10(c). Accordingly, the First Circuit in the case below correctly directed the Board to consider the employer's burden in light of *Burdine*.

The Act provided the basic statutory scheme followed by Congress in enacting Title VII.[12] The Act makes it an unfair labor practice to discriminate against employees who exercise their rights concerning union or protected activity. Similarly, Title VII prohibits discrimination in employment based upon race, sex, religion and national origin. The parallel language of Section 10(c) of the Act and Section 706(g) of Title VII indicates that neither statute was intended to "diminish traditional management prerogatives" or the employer's legitimate interest in an efficient and productive work force. *See Steelworkers v. Weber*, 443 U.S. 193, 205-06 (1979) and *NLRB v. Truck Drivers Local*, 353 U.S. 87 (1957). Similarly, neither

[12] *See Lorillard v. Pons*, 434 U.S. 575, 578 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. U.S. 405, 419 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974).

statute demands that an employer give preferential treatment to persons protected thereby. An employee in a protected class under either statute should not be in a better position than he would have held if he were not so protected. A contrary result necessarily would impair the employer's freedom to apply legitimate performance standards and would place the protected person in a preferred class. *See Burdine,* 450 U.S. at 893-96 and *Wright Line,* 251 N.L.R.B. at 1086.

Since the language of, and the policies promoted by, these provisions are substantially similar, and because there appears to be no justification for placing a greater evidentiary burden on an employer accused of discrimination under the Act than upon one accused of Title VII discrimination, this Court should extend the *Burdine* burden allocation test to cases arising under the Act. This would standardize the burdens in both these employment discrimination cases and, in so doing, would lend certainty to a confused area of employment law, and impart a sense of predictability to the expectations of parties contemplating or engaged in litigation.

B. The Board's obligation under Section 10(c) to prove an unfair labor practice by a preponderance of the evidence requires it to allocate burdens in accordance with *Burdine*, and the Board's allocation in accordance with *Mt. Healthy* is in excess of the Board's authority.

In relying upon *Mt. Healthy* and in requiring respondent to overcome the General Counsel's *prima facie* case by establishing by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent the employee's union activities, the Board exceeded its authority under the Act and its own regulations. The First Circuit's direction to the Board to reconsider the burden upon the employer under *Burdine* seeks to cure these defects in the Board's approach.

Examination of the relevant statutes compels the conclusion that the *Burdine* burden allocation test should govern the Board's approach. Section 10(c) of the Act provides that the Board must dismiss a complaint when "upon the preponderance of the testimony taken" the Board "shall not be of the opinion" that an unfair labor practice was committed. Regulation 101.10(b) of the Board's Regulations, 29 C.F.R. §101.10(b) (1980), state that "[t]he Board's attorney has the burden of proof of violations of Section 8 of the National Labor Relations Act." Additionally, Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556, states that "[e]xcept as otherwise provided by statute, the proponent of an order has the burden of proof." In the face of these clear provisions, the Board cannot in good faith contend that the overall burden of proving a violation does not rest with it. More precisely, these provisions make it irrefutably clear that when the evidence is at equipoise, the General Counsel has not carried its burden and a violation of the Act should not be sustained.

In an effort to avoid its clear statutory mandate, the Board urges this Court to look beyond the face of Section 10(c) to that provision's legislative history. Although the statute is clear on its face and such an exercise is unwarranted, *United States v. American Trucking Association, Inc.*, 310 U.S. 534, *reh'g denied*, 311 U.S. 724 (1939), even a resort to the legislative underpinnings requires the same result.

In order to understand Congress' intent in enacting the disputed portion of Section 10(c), this Court must examine three provisions Act enacted by Congress in 1947 to amend the Wagner Act. The legislative history to the disputed provision of Section 10(c), viewed independently, is inconclusive on the question of burden of proof.[13]

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[13] *See NLRB v. Wright Line*, 662 F.2d at 904 n.8.

Congress first amended Section 10(c) to require specifically that discharges for cause be beyond the remedial authority of the Board.[14] In explicitly recognizing management rights, Congress strove to eliminate the Board's practice of inferring that ". . . because [an employee] was a member or an official of a union, this, not his misconduct was the reason for his discharge."[15] The amendment to Section 10(c) which required the Board to base unfair labor practices on a "preponderance of the evidence" standard rather than the virtually unreviewable "all the testimony" standard of the Wagner Act[16] was the second limitation on the Board's resolution of Section 8(a)(3) cases. In essence, this amendment requires the Board to identify the specific evidence relied upon instead of simply resting its discussion on all the evidence presented.[17] The enhanced preponderance of the evidence requirement was reinforced by the simultaneous amendment to Section 10(e) to substitute a more stringent "substantial evidence" review standard for existing "supported by evidence" standard.[18] Through this amendment Congress enhanced the courts' power of review to insure agency adherence to its heavier burden of proof.[19]

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[14] Labor Management Relations Act of 1947, sec. 101, § 10(c) (amending National Labor Relations Act § 10(c), 29 U.S.C. § 160(e) (1970).

[15] H.R. Rep. No. 245, 80th Cong., 1st Sess. 42 (1947), *reprinted in* LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 505, 559.

[16] Labor Management Relations Act of 1947, sec. 101, §10(e) (amending National Labor Relations Act §10(e), 29 U.S.C. §160(e) (1970).

[17] H.R. CONF. REP. No. 510 80th Cong., 1st Sess. 56 (1947), *reprinted in* LEGISLATIVE HISTORY, *supra* note 15, at 505, 560.

[18] Labor Management Relations Act of 1947, sec. 101, §10(e) (amending National Labor Relations Act §10(e), 29 U.S.C. §160(a) (1970).

[19] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 56 (1947), *reprinted in* LEGISLATIVE HISTORY, *supra* note 15, at 505, 560.

These provisions, taken together, strongly suggest that the drafters of the 1947 amendments intended to impose stiffer evidentiary tests to be used in discriminatory discharge cases. Thus, the Board's argument that Congress, through the 1947 amendments, left unfettered the Board's approach to these cases, thereby approving of it, is aptly refuted.

The Board's failure to acknowledge its statutory mandate caused it erroneously to look to *Mt. Healthy* to allocate burdens of proof. Since no statutory or regulatory provisions, such as those which limit the Board's authority, were present in *Mt. Healthy,* the Court was free to allocate the burden of proof. It did so in that case by applying unique burdens applicable in measuring state action under constitutional standards. The Board, operating under strict statutory mandate, has no power to shift *Mt. Healthy* burdens onto the employer.

Similarly, in cases arising under 42 U.S.C. 1981, the lower courts, observing traditional allocation of the burden of proof in enforcing a statute which does not identify the party upon whom the burden of proof is placed, have followed the *Burdine* approach. *See Banerjee v. Board of Trustees of Smith College,* 648 F.2d 61 (1st Cir. 1981), *cert. denied,* 102 S. Ct. 671 (1981); *Underwood v. Jefferson Memorial Hosp.,* 637 F.2d 455 (8th Cir. 1981); *Kenyatta v. Bookey Packing Co.,* 649 F.2d 552 (8th Cir. 1981); *Metrocare v. Wmata,* 25 Fair Empl. Prac. Cas. (BNA) 76 (D.D.C. 1981); *Harris v. Richards Manufacturing Co.,* 511 F.Supp. 1193 (W.D. Tenn. 1981); *Hobson v. Western Airlines,* 25 Fair Empl. Prac. Cas. (BNA) 1509 (N.D. Cal. 1980); *Metcalf v. Omaha Steel Castings Co.,* 507 F. Supp. 679 (D. Neb. 1981); *Wade v. New York Telephone Co.,* 500 F.Supp. 1170 (S.D.N.Y. 1980). Application of *Burdine* by these courts is a further testament to the inapplicability of *Mt. Healthy* to statutory cases. The Board's reliance upon *Mt. Healthy,* then, was misplaced and is inconsistent with the Board's statutory constraints.

V. THE BOARD MISCHARACTERIZES THE EMPLOYER'S RESPONSE AS AN AFFIRMATIVE DEFENSE AND, BASED ON THIS ERROR, TRANSFERS THE ULTIMATE BURDEN OF PROOF FROM THE GENERAL COUNSEL TO THE EMPLOYER.

This Court, in *Burdine*, explained in detail how discriminatory intent must be proven in cases alleging discriminatory treatment.[20] In so doing, this Court characterized the defendant's burden as an obligation to rebut the legally mandatory presumption which arises when the plaintiff establishes its *prima facie* case. This Court implicitly rejects the Board's contention that the defendant's obligation is to raise an "affirmative defense" to the General Counsel's *prima facie case*. An affirmative defense admits the allegations of the complaint to be true and raises a defense to them to negate any basis for a remedy. *See County of Washington v. Gunther*, 452 U.S. 161, 167-81 (1981); FED. R. CIV. 8(c); and *NLRB v. Wright Line*, 662 F.2d. at 906.

In the case below no affirmative defense was raised or required as there was no admission that unlawful conduct played any part in the decision under review.

Under the reasoning of *Burdine*, this Court implicitly recognized that the nature of the defense raised in a Title VII case is more akin to a direct defense—a denial as to unlawful conduct rather than to an affirmative defense, which involves an admission that the unlawful conduct occurred coupled with a description of the true motivation. *See NLRB v. Wright Line*, 662 F.2d at 906. This characterization is also true as to the nature of the defenses raised in Section 8(a)(3) cases. *Id.* at 906.

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[20] *See supra* note 11.

The Board's elaborate framework merely requires the General Counsel to produce evidence sufficient to support the inference that protected conduct was "a 'motivating factor' in the employer's decision." This evidence can do nothing more than raise a *prima facie* case, as no more is possible without consideration of all the evidence. The General Counsel at that point has established nothing more than a rebuttable presumption. Absent *conclusive proof* that protected activity was a motivating factor, or an admission of such, the employer's response necessarily cannot be characterized as an affirmative defense. As in Title VII cases, the employer's response in Section 8(a)(3) cases is generally a denial of unlawful conduct and a statement of the valid reasons therefore, i.e. a direct defense. The Board cannot avoid its statutory obligation by simply mischaracterizing the nature of the employer's response.

VI. CONCLUSION

Notwithstanding the Board's assertion that it has adopted the "but for" substantive standard, the Board's procedural analysis perpetuates the same confusion the Board purported to eliminate. Under the Board's *Wright Line* process, true motive is not shown. The General Counsel will prevail without having sustained the burden of proving that unlawful activity truly motivated the employer. Thus, the *Wright Line* test is inconsistent with the applicable provisions of the Act and the policies it promotes.

For the foregoing reasons, the judgment of the court below should be affirmed.

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January 29, 1983

FILED
FEB 4
ALEXANDER L. STEVAS,
CLERK

No. 82-[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TRANSPORTATION MANAGEMENT CORP.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AS AMICUS CURIAE SUPPORTING THE VIEWS OF RESPONDENT

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AS AMICUS CURIAE SUPPORTING THE VIEWS OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Council on Labor Law Equality ("COLLE") is a national association of large and small employers formed to monitor the activities of the National Labor Relations Board and related developments under the National Labor Relations Act and to provide support to employer interests on those issues which affect a broad section of industry. COLLE was formed in recognition of the need for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions in order to maintain a balanced approach in the formation and interpretation of national labor policy. This brief amicus curiae is filed with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

This case calls into question the degree to which union activism may operate to insulate an incompetent or disobedient employee from discharge by a private corporation. At stake are two competing interests of the National Labor Relations Act: the right of an employee to participate freely and without discrimination in union activities;[1] and the right of an employer to discipline or discharge an employee for cause.[2] These interests collide when a union activist is discharged for legitimate business reasons in what has become known as a "dual motive" or "mixed motive" discharge.

The practical standard by which the NLRA's competing interests are reconciled is found in an evidentiary test intended to guide the fact-finder in reaching an appropriate result. When the General Counsel for the National Labor Relations Board brings an improper discharge case against an employer who had proper business reasons for terminating an employee, the record invariably discloses "good" and "bad" reasons for the discharge. Because the text of the Act does not identify the degree of anti-union animus necessary to violate its prohibition against union-oriented discrimination, the Board and the circuit courts have fashioned a variety of tests for gauging the employer's true motive in effecting the discharge.

The Board's test has evolved through a history of heated debate, questionable application, congressional modification

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[1] 29 U.S.C. §158(a)(3) provides, as pertinent, "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...."

[2] 29 U.S.C. §160(c) provides, as pertinent, "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

and conflict among the circuit courts. As articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1038 (1980), *enf'd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 982 (1982), the Board believes that once the General Counsel has made a prima facie showing sufficient to support the inference that protected activities constituted a motivating factor for the discharge, the burden shifts to the employer to demonstrate that the discharge would have resulted without regard to the employee's union-oriented activities. All that is necessary to shift the burden is proof that the protected activity was "a motivating factor" in the discharge; the evidence required to shift the burden is the same qauntum of proof required to sustain reinstatement. The Board contends that this test is consistent with the guidelines established in a related context by *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

The court below accepted *Wright Line* to the point at which the employer must come forward to combat the General Counsel's prima facie case. At that point, the employer must *produce* evidence to *neutralize* the inference of reliance upon protected activities; but, according to the court, the General Counsel continues to bear the burden of proof: "While this Court has upheld the Board's practice of imposing upon the Company the burden of *neutralizing* the implication of sufficient anti-union motive arising from the General Counsel's *prima facie* case, it has rejected both explicitly and implicitly any effort by the Board to impose a *greater* burden that this upon the Company, as outside the Board's statutory authority." *NLRB v. Transportation Management Corp.*, 674 F.2d 130, 131 (1st Cir. 1982) (per curiam) (footnote and citations omitted) (emphasis in original).

The *Wright Line* test inextricably intertwines substantive issues—the degree of anti-union animus necessary to taint the discharge—with procedural issues—the shifting burden of

proof. While the First Circuit's test correctly placed the ultimate burden of proof on the General Counsel in accordance with the requirements of the NLRA, we believe that both the Board and the court below have misread *Mt. Healthy* and failed to take cognizance of the line of authorities culminating with *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), in failing to distinquish between the nature of the showing necessary to compel the employer to come forward with evidence neutralizing the inference of anti-union animus and the General Counsel's ultimate burden to justify a reinstatement order.[3]

Thus, in our view, the issue presented in this case cannot be resolved in a meaningful fashion unless it is divided into two components: (1) whether the quantum of evidence necessary to shift the burden is equal to the quantum necessary to justify reinstatement; and (2) whether the burden thus shifted is a burden of production or one of persuasion.

Under this mode of analysis, we will demonstrate that the correct test is as follows:

In a mixed motive discharge case, the General Counsel should have the burden of proving that the employee's union related activities represented "a motivating factor" in his discharge. If the trier of fact is satisfied that this burden has been sustained, it should require the employer to produce evidence to demonstrate that the employee was discharged for a legitimate business reason. If the employer does so, the

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[3] Throughout this brief, we use the term "reinstatement" to mean a Board finding that the employer engaged in an "unfair labor practice." While this is intended to promote clarity on the facts of this case, we acknowledge that reinstatement is not the sole remedy available to the Board upon the finding of an unfair labor practice. In some cases, this finding may warrant other relief such as back pay or a cease and desist order. In others, the finding may not justify reinstatement due to intervening events.

General Counsel must prove that the employer's reliance on protected activities was the *dominant* reason for the discharge. Because the burden of proof remains with the General Counsel throughout the proceeding, reinstatement is inappropriate when the respective proof is in equipoise at the close of evidence.

This standard is warranted by the legislative history of the NLRA and decisions of this Court and represents the appropriate mense point in reconciling conflicting policies of the Act in an atmosphere of industrial peace and harmony.

ARGUMENT

I.

THE HISTORICAL EVOLUTION OF THE *WRIGHT LINE* TEST DEMONSTRATES THAT IT WAS BASED UPON AN ERRONEOUS READING OF THE LEGISLATIVE HISTORY OF THE TAFT-HARTLEY ACT AND A MISAPPLICATION OF THIS COURT'S DECISIONS IN RELATED AREAS

A. The Requirement of Anti-Union Animus Under the NLRA

"It should be emphasized that the right to terminate a contract of employment is a constitutional right of the utmost importance."[4] Thus, in one of its earliest reviews of the Act, this Court recognized that the NLRA "does not interfere with the normal exercise of the right of the employer to select its employees or discharge them."[5] This preliminary consideration is consistent with both the legislative history of the Act and this Court's focus on the intent of the employer as the critical factor in determining the propriety of a discharge.

In the legislative history surrounding the development of the Wagner Act, Congress repeatedly stressed that Section 8(a)(3) was not intended to abridge the common law "right of employers to select their own employees or to discharge them."[6] The gist of the Act's protection proscribed reliance

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[4] *NLRB* v. *Citizen-News Co.*, 134 F.2d 970, 973 (9th Cir. 1943); *see NLRB* v. *Standard Coil Products Co.*, 224 F.2d 465, 470 (1st Cir.), *cert. denied*, 350 U.S. 902 (1955) ("It is well accepted law that an employer may discharge an employee for any reason, reasonable or unreasonable, so long as it is not a reason prohibited by the Act").

[5] *NLRB* v. *Jones & Laughlin Steel Corp.*, 30 U.S. 1, 45-46 (1937).

[6] H.R. Rep. No. 1147, 74th Cong., 1st Sess. 19 (1935); *see also* H Rep. No. 573, 74th Cong., 1st Sess. 11 (1935) ("Of course nothing in

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upon a forbidden, union-oriented reason for the discharge. Accordingly, this Court has recognized that "[i]t is the 'true purpose' or 'real motive' in hiring and firing that constitutes the test."[7]

In theory, Congress intended to protect the employer's right to maintain an efficient and productive work force by permitting employee discharges except when the termination was motivated by the employer's anti-union animus. In practice, the Board immediately began to cast asunder the congressional objective by authorizing reinstatement whenever the employee's protected activities played any role, however small, in the discharge decision. Thus, the Board believed that "so long as one of the grounds for the discharge was discriminatory, it is immaterial that additional considerations may have lent weight to the [employer's discharge] decision."[8]

Two decisions illustrate the Board's practices during this period. In *Wyman-Gordon Co.*, 62 NLRB 561 (1945), *enforc-*

(footnote continued from preceding page)

the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude, or from demoting him for failure to perform"); 78 Cong. Rec. 10560 (1934) (remarks of Sen. Walsh) ("An employer is not prevented from discharging any employee who lacks skill or ability, nor is he required to hire an incompetent man.").

[7] *Local 357, Int'l Broth'd of Teamsters* v. *NLRB*, 365 U.S. 667, 675 (1961); *see also Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 42-44 (1954) ("That Congress intended the employer's purpose in discriminating to be controlling is clear"); *Associated Press* v. *NLRB*, 301 U.S. 103, 132 (1937) (Labor Act "forbids discharge for what has been found to be the real motive" of the employer). *See generally* Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv.L.Rev. 1, 21 (1947).

[8] Carl L. Norton, Inc., 62 NLRB 828, 831 n.12 (1945); *see also* John W. Campbell, Inc., 58 NLRB 1153, 1162-63 (1944); Lone Star Gas Co., 52 NLRB 1058, 1060 (1943); United Dredging Co., 30 NLRB 739, 766 (1941); Republic Creosoting Co., 19 NLRB 267, 294 (1940).

ment denied in relevant part, 153 F.2d 480 (7th Cir. 1946), the Board disregarded the conclusions of the fact-finder and reevaluated the evidence to determine that an employee was discharged for union related activities rather than for interrupting the production of vital war materials. In *Columbia Products Corp.*, 48 NLRB 1452 (1943), *enf'd.*, 141 F.2d 687 (2d Cir. 1944), a distinguished panel of the Second Circuit felt compelled to enforce a reinstatement order despite evidence of employee insubordination in circumstances in which the court felt that the Board's finding of an unfair labor practice "strained the credibility."

B. The Taft-Hartley Amendments

Board decisions of this nature motivated Congress to take corrective action. In 1947, Congress, citing its dissatisfaction with cases of the *Wyman-Gordon* and *Columbia Products* ilk,[9] enacted three amendments to the Wagner Act specifically directed toward the Board's undue reliance upon employee union activity to infer a nefarious motive from a discharge for business-related cause.

First, language was added to Section 10(c) to prohibit the Board from ordering reinstatement upon discharge for cause.[10] Reviewing the existing practices, Congress recognized that, "[i]n the past, the Board, admitting that an employee was guilty of gross misconduct, nevertheless frequently reinstated him, 'inferring' that, because he was a member or an official of a union, this, not his misconduct, was the reason for his discharge."[11] The new language was added to prohibit the Board from reinstating an employee unless the "evidence shows

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[9] See H.R.Rep. No. 245, 80th Cong., 1st Sess. 41-42 (1947).

[10] See note 2 *supra*.

[11] H.R.Rep. No. 245, 80th Cong., 1st Sess. 42 (1947).

that the individual was not suspended or discharged for cause."[12] Accordingly, as Congress viewed this portion of Taft-Hartley, the Board "may not 'infer' an improper motive when the evidence shows cause for discipline or discharge."[13]

Second, Congress retrenched from the Wagner Act standard that allowed the Board to predicate its findings on "all the testimony." Acknowledging that this open-ended criterion permitted the Board too much leeway to justify discriminatory discharges from selected portions of the record or to fashion prohibited practices from multiple inferences, Congress imposed a "preponderance of the evidence" standard to eliminate the potential for abuse.[14] This change was deemed necessary to assure that inference would not be substituted for evidence.

Third, Congress altered the standard for judicial review of Board decisions, as set forth in Section 10(e), by requiring the rulings to be supported by "substantial evidence" rather than, as previously permitted, "supported by the evidence." This was intended to provide the circuit courts with "a real power to review" so that Board decisions no longer could represent an amalgam of inferences unsupported by facts.[15]

The combination of these amendments represented a congressional attempt to restrain a Board that was operating beyond the scope of its legislative mandate. By removing the Board's remedial authority to reinstate an employee when the discharge was for cause, by raising the evidentiary standard, and by enhancing the opportunity for judicial review, the Taft-Hartley amendments condemned the Board's "in part" test and its practice of drawing inferences without evidentiary support. In so doing, "Congress expressed a mood...that courts must now

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[12] Ibid.

[13] *Id.* at 43.

[14] H.R. Conf.Rep. No. 510, 80th Cong., 1st Sess. 56 (1947).

[15] Ibid.

assume more responsibility for the reasonableness and fairness of Labor Board decisions...."[16]

C. The Aftermath of Taft-Hartley

Notwithstanding the will of Congress, the Board continued to apply the "in part" motivation test and authorized reinstatement when a discharge was motivated in part by the employee's union related activities even though a legitimate business reason for termination also existed. Blithely ignoring the concerns of Congress, the Board articulated the rule as follows:

> Under Board precedent if part of the reason for terminating an employee is unlawful, the discharge violates the Act. As the Board and the courts have so often indicated, the issue is not whether there existed grounds for discharge apart from union or protected concerted activities. That the employer has ample reason for discharging an employee is of no moment. An employer may discharge an employee for any reason, good or bad, so long as it is not for union or protected concerted activity. Even if the discharge is based on other reasons as well, if the discharge is partly in reprisal for protected concerted activity, it is unlawful.[17]

This intractability on the Board's part caused considerable consternation among the reviewing courts. A variety of tests were spawned which generated confusion both within and among the circuits. The terminology employed by the courts to frame the tests contributed to the chaos.

Reduced to their rudiments, essentially three different tests were developed by the courts to ascertain the degree of anti-union animus necessary to warrant reinstatement:

The "in part" test, fully supporting the Board's historic practice, authorized reinstatement when a discharge was motivated at least in part by union-oriented activity. It was the

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[16] *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487-90 (1951).

[17] Youngstown Osteopathic Hospital Ass'n., 224 NLRB 574, 575 (1976).

exclusive test employed by the Seventh[18] and Tenth[19] Circuits and had been adopted by panels of other circuits.[20]

At the other extreme was the "dominant motive" or "real motive" test which required the General Counsel to prove that the employee's protected activity furnished the dominant reason for his discharge. This doctrine had its origin in the First Circuit[21] and found considerable support among panels of other circuits.[22]

Between these poles was a middle ground that was expressed as a "but for" test, a "motivating factor" test, a "justifiable cause" test, a "moving cause" test and under various other labels. Essentially, discharge was prohibited under this ruberic if some evidence was adduced to show that

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[18] *See, e.g., Chicago Magnesium Castings Co.* v. *NLRB*, 612 F.2d 1028, 1034 (7th Cir. 1980); *Satra Belarus* v. *NLRB*, 568 F.2d 545, 548 (7th Cir. 1978); *Borek Motor Sales, Inc.* v. *NLRB*, 425 F.2d 677, 680 (7th Cir. 1970).

[19] *See, e.g., MSP Industries* v. *NLRB*, 568 F.2d 166, 173-74 (10th Cir. 1977); *NLRB* v. *Montgomery Ward & Co., Inc.*, 554 F.2d 996, 1002 (10th Cir. 1977).

[20] *See, e.g., NLRB* v. *Gladding Keystone Corp.*, 435 F.2d 129, 131 (2d Cir. 1970); *NLRB* v. *Printers Publishing Co.*, 625 F.2d 746, 749 (6th Cir. 1980); *Retail Store Employees* v. *NLRB*, 570 F.2d 586, 590 (6th Cir. 1978); *Penasquitos Village, Inc.* v. *NLRB*, 565 F.2d 1074, 1082-83 (9th Cir. 1977); *Allen* v. *NLRB*, 561 F.2d 976, 982 (D.C. Cir. 1977).

[21] *See, e.g., NLRB* v. *Wilson Freight*, 604 F.2d 712 (1st Cir. 1979); *Colletti's Furniture, Inc.* v. *NLRB*, 550 F.2d 1292 (1st Cir. 1977); *NLRB* v. *Lowell Sun Publishing Co.*, 320 F. 2d 835 (1st Cir. 1963).

[22] *See, e.g., Edgewood Nursing Center, Inc.* v. *NLRB*, 581 F.2d 363, 368 ;(3d Cir. 1978) (real motive); *Charge Card Assn.* v. *NLRB*, 653 F.2d 272, 275 (6th Cir. 1981); *NLRB* v. *Consolidated Freightways Corp.*, 651 F.2d 436, 437 (6th Cir. 1981); *Propak Corp.* v. *NLRB*, 578 F.2d 169, 170 (6th Cir. 1978)(actual impelling motive); *NLRB* v. *Nevis Industries*, 647 F.2d 905, 909 (9th Cir. 1981); *Western Exterminator Co.* v. *NLRB*, 565 F.2d 1114, 1118 (9th Cir. 1977).

the employer was motivated by protected activity even if the proof was not strong enough to show that anti-union animus was the dominating factor for the termination.[23]

D. The *Wright Line* Test

The extraordinary confusion over the appropriate standard to be employed in mixed motive discharge cases and the repeated judicial refusals to enforce Board orders ultimately became too much for the Board to bear. In *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), the Board attempted to accomodate the conflicting lines of authority by focusing on two decisions of this Court which, in the Board's view, rejected both the "in part" and "dominant motive" tests and suggested a "motivating factor" standard.[24] Upon this basis, the Board announced a new causation test for dual motive discharge cases:

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same

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[23] *See, e.g., Waterbury Community Antenna, Inc.* v. *NLRB*, 587 F.2d 90, 98 (2d Cir. 1978)(but for); *Stein Seal Co.* v. *NLRB*, 605 F.2d 703 (3d Cir. 1979)(justifiable cause); *Neptune Water Meter Co.* v. *NLRB*, 551 F.2d 568 (4th Cir. 1977)(a factor); *NLRB* v. *Robin America Corp.*, 654 F.2d 1022 (5th Cir. 1981) (motivating factor); *NLRB* v. *Collier*, 553 F.2d 425, 428 (5th Cir. 1977)(motivating factor); *Frosty Morn Meats, Inc.* v. *NLRB*, 396 F.2d 617, 621 (5th Cir. 1961)(moving cause); *Keokuk Gas Service Co.* v. *NLRB*, 580 F.2d 328, 335 (8th Cir. 1978)(but for); *Lippincott Industries* v. *NLRB*, 661 F.2d 112 (9th Cir. 1981)(moving cause or but for cause); *Amalgamated Clothing Workers* v. *NLRB*, 564 F.2d 434, 440 (D.C. Cir. 1977) (but for).

[24] *See Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

> action would have taken place even in the absence of the protected conduct.

251 NLRB at 1089.

Satisfaction of the substantive "motivating factor" standard was deemed sufficient to both shift the burden of proof and sustain the ultimate burden to justify reinstatement if the employer could not demonstrate that a legitimate business reason compelled the discharge. The Board acknowledged that, although it was abdicating the "in part" standard, "our abandonment of this familiar phraseology should not be viewed as a repudiation of the well-established principles and concepts which we have applied in the past." Member Jenkins concurred in the result, but suggested that the "in part" test remained the only suitable criterion for cases in which the employer's purposes in effecting the discharge "are so interlocked that it is not possible to point to one of them as 'the' cause".

To the extent that it shifts the burden of production to the employer when the evidence shows that the protected activity was "a motivating factor" in the discharge, *Wright Line* is an accurate statement of law. However, by shifting the burden of *proof* to the employer to demonstrate that the same action would have taken place in the absence of the protected conduct, *Wright Line* requires the employer to prove that a legitimate business reason was the dominant motive for the discharge. Thus, despite the Board's lip service to a repudiation of the "in part" doctrine, the General Counsel can carry his burden, both before and after *Wright Line*, by proving that a prohibited reason was part of the employer's motive for the discharge.

In the wake of its decision, it became clear that the Board, like the proverbial open-air market watch salesman, intended *Wright Line* to repackage the discredited "in part" test in a shinny new case while retaining its inferior mechanical parts. Thus, Chairman Fanning stated that *Wright Line* was the

"minimal deviation we could make" and "shouldn't be interpreted as a change in Board Policy."[25] Member Truesdale stated that "The case does not change the Board's traditional allocation of the burden of proof, nor is it likely to alter the standards by which the Board determines whether a litigant has carried its burden of proof."[26] The Board's General Counsel informed his staff throughout the country that *Wright Line* was no more than a clarification of the Board's traditional test rather than a substantive change in the animus standard required to support reinstatement in dual motive discharge cases.[27]

As thus seen, *Wright Line* was intended to represent nothing more than a restatement of the "in part" test; and, in practice, this intent has been preserved. "When post-*Wright Line* cases issued by the board are examined, it is obvious that although utilizing somewhat different terminology, the board continues to employ the in-part analysis."[28]

E. The Judicial Response To Wright Line

For the most part, the courts have viewed *Wright Line* as an acceptable method for reducing the confusion that previously existed in dual motive discharge cases. While most opinions have merely recited and applied the *Wright Line* test

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[25] BNA Daily Labor Reports (1-29-81) (speech before the Industrial Union Dept. AFL-CIO Organizing Conference).

[26] 4 Lab.L.Rep. (CCH) ¶9239 (10-3-80) (remarks before the Labor Law and Labor-Management Relations Conference).

[27] General Counsel Memorandum 80-58 (11-24-80)("if the employer fails to establish the affirmative defense, the General Counsel will prevail, regardless of the quantum of unlawful motivation involved").

[28] Lasky & Leathers, *Applying The Wright Line Test: Mixed Results in the Circuits*, Nat'l. L.J., 3-22-82, at 32, col 1; *see also* Coleman, *Wright Line: A Variation of the Old Shell Game—Now You See It, Now You Don't*, 28 Fed. B. News & J. 208, 209 (1981).

without extended discussion,[29] the clear conflict that brought the case to this Court evolved from disparate views over the propriety of shifting the burden of proof to the employer. The Eighth and Ninth Circuits have accepted the *Wright Line* test in total;[30] the First, Third and Seventh Circuits have held that the NLRA prohibits the Board from shifting the burden.[31] Different panels of the Fifth Circuit appear to be divided on the question;[32] and the Fourth, Sixth and Tenth Circuits have acknowledged but declined to decide the issue.[33]

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[29] *See, e.g., Borel Restaurant Corp.* v. *NLRB*, 676 F.2d 190 (6th Cir. 1982); *Doug Hartley Inc.* v. *NLRB*, 669 F.2d 579 (9th Cir. 1982); *NLRB* v. *Charles H. McCauley Associates Inc.*, 657 F.2d 685, 1688 (5th Cir. 1981); *NLRB* v. *Robin American Corp.* 654 F.2d 1022, 1025 (5th Cir. 1981); *Charge Card Ass'n.* v. *NLRB*, 653 F.2d 272, 275 (6th Cir. 1981); *NLRB* v. *Fry Roofing Co.*, 651 F.2d 422, 446 (6th Cir. 1981); *NLRB* v. *Allen's IGA Foodliner*, 651 F.2d 438, 440 (6th Cir. 1981); *NLRB* v. *Consolidated Freight Ways*, 651 F.2d 436 (6th Cir. 1981); *NLRB* v. *Nevis Industries*, 647 F.2d 905 (9th Cir. 1981).

[30] *See Zurn Industries, Inc.* v. *NLRB*, 680 F.2d 683 (9th Cir. 1982); *NLRB* v. *Fixtures Mfg. Corp.*, 669 F.2d 547, 550 (8th Cir. 1982).

[31] *See NLRB* v. *Webb Ford*, 689 F.2d 733, 739 (7th Cir. 1982); *Behring Int'l. Inc.* v. *NLRB*, 675 F.2d 83 (3d Cir. 1982); *NLRB* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

Prior Seventh Circuit decisions seemed to indicate acceptance of the *Wright Line* test. *See, e.g., NLRB* v. *Town & Country LP Gas*, 687 F.2d 187 (7th Cir. 1982); *NLRB* v. *Eldorado Mfg. Co.*, 660 F.2d 1207 (7th Cir. 1981); *Peavey Co.* v. *NLRB*, 648 F.2d 460 (7th Cir. 1981); *Sullair P.T.O. Inc.* v. *NLRB*, 641 F.2d 500 (7th Cir. 1981). However, in *Webb Ford*, the court indicated that its earlier rulings did not reach the procedural qestion. 689 F.2d at 739 n.5.

[32] *Compare Red Ball Motor Freight, Inc.* v. *NLRB*, 660 F.2d 626, 627-28 (5th Cir. 1981), *cert. denied*, ____ U.S. ____ (1982) (accepting burden shift without extended analysis) *with* TRW, Inc. v. NLRB, 654 F.2d 307 (5th Cir. 1981) (implictly rejecting burden shift)

[33] *See NLRB* v. *Comgeneral Corp.*, 684 F.2d 367, 369-70 (6th Cir. 1982); *NLRB* v. *Carbonex Coal Co.*, 679 F.2d 200, 203-04 (10th

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The courts that disapproved of the burden shifting requirement were compelled to reach the substantive degree of anti-union animus necessary to satisfy the General Counsel's ultimate burden. In *Wright Line*, the First Circuit abandoned its prior "dominant motive" test and accepted the Board's "but for" standard, finding the causitive link between anti-union animus and the discharge "most accurately determined by asking whether the discharge would have occurred 'but for' the protected activity." 662 F.2d at 903. In *Behring International*, the Third Circuit found that the "but for" test "satisfies this court's requirement that the Board seek the 'real motive' or 'real cause' for an employee's discharge." 675 F.2d at 87. In *Webb Ford*, the Seventh Circuit altered the formulation somewhat, stating that the General Counsel "has the obligation to prove by a preponderance of the evidence that those proffered reasons were not the Company's true reasons for the discharge." 689 F.2d at 739.[34]

As the issue comes before this Court, there is a clear conflict on the burden of proof question. We will demonstrate that the authorities which compel the General Counsel to satisfy the burden of proof were correctly decided. Once that issue is resolved, however, it is necessary to define the substantive scope of the burden. On that score, we will show that it is incumbent

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Cir. 1982); *NLRB* v. *Burns Motor Freight, Inc.*, 635 F.2d 312, 315 (4th Cir. 1980). Prior Fourth Circuit law clearly placed the burden on the General Counsel to show "an affirmative and persuasive reason why the employer rejected the good reason and chose the bad one." *Proctor & Gamble Mfg. Co.* v. *NLRB*, 658 F.2d 968, 980 (4th Cir. 1981).

[34] The Sixth Circuit has recognized that the substantive degree of anti-union animus under *Wright Line* is less than the dominant motive test, but did not have occasion, on the facts before it, to determine the appropriate burden. *Charge Card Ass'n.* v. *NLRB*, 653 F.2d 272, 275 (6th Cir. 1981).

on the General Counsel to prove that protected activities furnished the employer's dominant motive in effecting the discharge.

II

BECAUSE THE DEGREE OF ANTI-UNION ANIMUS NECESSARY TO SUSTAIN REINSTATEMENT—THE SUBSTANTIVE BURDEN — IS INEXTRICABLY INTERTWINED WITH THE IDENTIFICATION OF THE PARTY WHO BEARS THAT BURDEN — THE PROCEDURAL BURDEN — THIS COURT'S TITLE VII DECISIONS FURNISH THE APPROPRIATE STANDARDS FOR RESOLVING SECTION 8(a)(3) DUAL MOTIVE DISCHARGES.

A. The Impact Of *Mt. Healthy*

The analytical framework for the Board's *Wright Line* test was supplied by this Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). There, a school teacher was notified that his contract would not be renewed shortly after he called a local radio station to criticize the school's new dress code policy. The lower courts sustained his constitutional claim on the theory that the discharge was motivated "at least in part" by constitutionally protected activity.

In a unanimous opinion, this Court rejected the "in part" rationale and announced a test of causation designed to identify the principle cause of the discharge:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those

> responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position that if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

429 U.S. at 285-86.

By analogy to the line of criminal cases dealing with the concept commonly recognized as the "fruit of the poisonous tree" doctrine.[35] the Court fashioned "a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused." 429 U.S. at 286. Under this mode of analysis, Justice Rehnquist's opinion stated the substantive scope of the burden and the manner in which it must be discharged:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "*motivating factor*" in the Board's decision not to rehire him. Respondent having carried that burden,

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[35] *See, e.g., Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Nardone* v. *United States*, 308 U.S. 338, 341 (1939). *See also Parker* v. *North Carolina*, 397 U.S. 790 (1970); *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944).

> however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

429 U.S. at 287 (emphasis added)(footnote omitted).

The "motivating factor" phrase in the above quotation contained a footnote reference to *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), decided the same day as *Mt. Healthy*. In *Arlington Heights*, a developer interested in building integrated housing in a Chicago suburb challenged the Village's refusal to rezone the property on constitutional and Fair Housing Act grounds. The Court rejected an "effects" test and indicated that the question turned on intent to discriminate. Outlining the respective burdens, the Court held that the plaintiff was obliged to prove that invidious discrimination was "a motivating factor" in the defendant's decision and rejected a higher "dominant motive" standard in this context:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

429 U.S. at 265-66 (footnotes omitted).[38]

Mt. Healthy did not rely upon the rejection of the dominant motive test in *Arlington Heights* when referencing the "motiva-

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[38] The Court's footnote references made it clear that the "dominant motive" test was rejected in the unique context of legislative purpose. *See McGinnis v. Royster*, 410 U.S. 263, 276-77 (1973); *Palmer v. Thompson*, 403 U.S. 217 (1971). 429 U.S. at 266 nn. 11-12.

ting factor" language. Rather, the Court cited another portion of the opinion which concluded that the plaintiffs "simply failed to carry the burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry." 429 U.S. at 270-71.

These considerations leave the *Mt. Healthy* formulation open to a number of readings. First, *Mt. Healthy* can be viewed, in accordance with the Board's *Wright Line* test, to shift the burden of proof, absent statutory constraints not present in the constitutional balancing precepts involved in *Mt. Healthy*,[37] upon a showing that protected activity was a "motivating factor" in the discharge. Second, it can be read to demand a showing that the protected activity furnished the dominant motive for the discharge before the defendant is required to come forward with evidence designed to dissipate causation.[38] Finally, and most plausibly, *Mt. Healthy*, in its application to the NLRA context, can be viewed as a broad brush constitutional formulation that did not foreclose the possibility that an aggreived plaintiff may have both an intermediate and ultimate burden.

The Board and Amicus AFL-CIO attempt to accomodate *Mt. Healthy* to the *Wright Line* test; but, in so doing, they are compelled to mix the substantive component of that test with the procedural burden of proof question. Thus, the Board contends that "the General Counsel must prove by a preponderance of the evidence that the employee's protected activity was *in fact* a motivating factor in the employer's disciplinary decision." (Bd. Br. 30). At this point, the Board assumes that the General Counsel's ultimate burden is satisfied and argues that the employer must either discredit the General

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[37] *See* Argument IIB *infra*.

[38] *See* Wolly, *What Hath Mt. Healthy Wrought* 41 Ohio State L.J. 385 (1980); DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of Mt. Healthy Board of Education* v. *Doyle Upon the NLRA*, 66 Georgetown L.J. 1109 (1978).

Counsel's case by showing that the protected activity was not "a motivating factor" at all or carry the burden of an affirmative defense. (Bd. Br. 33).

Amicus AFL-CIO approaches the issue in the same manner, contending that the Board's ultimate burden is carried upon a showing that the employer relied upon any impermissable reason in terminating the employee. Following the introduction of proof of this nature, the issues become strictly remedial and the burden is on the employer because "the wrongdoer shall bear the risk of uncertainty which his own wrong has created".[39] (AFL-CIO Br. 7-8).

Thus, before the employer is ever called upon to produce evidence, both the Board and amicus assume that liability has been resolved against him and the stage of the proceeding is tantamount to the remedial stage of a Title VII case. Seen another way, these arguments would require a criminal defendant to produce evidence in mitigation of sentence without ever affording him the opportunity of a defense.

The problem with the Board's analysis is its assumption that there can be no such thing as a legitimate dual motive discharge. Once the General Counsel proves that a protected activity was any part of the motivation for the discharge, his case is over. The employer, at this point, is labelled a "wrongdoer" and must bear the burden of "disentang[ing] the consequences for which it was chargable from those for which it was immune."[40]

Under this formulation, the General Counsel need only demonstrate a "bad" motive and may ignore the possibility that the employer genuinely had a *dual* motive for the discharge. The employer then must offer an affirmative defense—with its

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[39] *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 265 (1946); *see Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931).

[40] *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862 (2d Cir.), *cert denied*, 304 U.S. 576 (1938). See AFL-CIO Br. 15-16.

requisite burdens—to show that the discharge would have occurred in the absence of the bad motive. For a variety of reasons, we do not believe that *Mt. Healthy* authorizes this procedure.

First, the Board loosely interprets *Mt. Healthy's* "motivating factor" requirement to mean "proof that the [discharge] decision was based, at least in part, on an unlawful reason." (Bd. Br. 33). This not only represents a resurrection of the Board's discredited "in part" test, but also flies in the face of the essential underpinning of the *Mt. Healthy* decision. As the Court subsequently has indicated, *Mt. Healthy* requires a discharged employee to show "that his constitutional protected conduct played a '*substantial*' role in the employer's decision"[41] before the burden will shift. Thus, the Court's pronouncements impose a greater burden than *Wright Line* acknowledges.

Second, the "but for" test that has evolved from *Mt. Healthy* represents a misreading of the opinion. Under *Mt. Healthy*, once the protected activity is proven to have substantially motivated the discharge, the employer must prove "that it would have reached the same decision...even in the absence of the protected conduct." 429 U.S. at 287. Substituting a mechanical equasion for hard analysis, the courts have viewed *Wright Line's* interpretation of *Mt. Healthy* to create a "but for" test under which reinstatement is warranted if the discharge would not have occurred "but for" the protected activity. The Board believes that the employer must prove, by way of affirmative defense, that the discharge was ordered for reasons independent of the union activity; the courts that have rejected

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[41] *Givhan* v. *Western Line Consolidated School Dist.*, 439 U.S. 410, 416 (1979) (emphasis added); *see also Teamsters* v. *United States*, 431 U.S. 324, 368 (1977) (*Mt. Healthy* cited for the proposition that proof of discriminatory practice is a "not always easy burden....").

the shifting burden believe that the General Counsel must prove that the employee would not have been fired "but for" the union activity".[42]

This simplistic "but for" formula is contrary to the import of *Mt. Healthy*. In establishing the constitutional test of causation, the Court analogized the discharge situation to its "fruit of the poisonous tree" doctrine governing the admissibility of evidence in criminal cases. One of the decisions relied upon, *Wong Sun v. United States*, 371 U.S. 471 (1963), specifically rejected a "but for" analysis as a framework for that constitutional test: "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police." 371 U.S. at 487-88 (emphasis added). In *Brown v. Illinois*, 422 U.S. 590, 603 (1975), the Court refused to hold a confession inadmissible simply because it would not have been secured "but for" an illegal arrest. Justice Powell's concurring opinion, joined by the author of *Mt. Healthy*, recognized "[t]he Court's rejection in *Wong Sun* of a 'but for' test, reaffirmed today...." 422 U.S. at 608. These cases focus not on neat formulas, but on whether the hard facts show that the evidence was tainted by the illegal conduct.

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[42] *See NLRB* v. *Wright Line*, 662 F.2d 899, 906 n.12 (1st Cir. 1982):

> Our disagreement with the Board may reduce to this: the Board apparently feels that the Act is violated by a showing of anti-union sentiment in connection with a discharge. It would then impose an affirmative defense upon the employer to negate the violation. In our view, by contrast, the Act is violated only when an employer with anti-union animus discharges an employee he would not have fired "but for" the employee's union activity. We think that even employers who do not particularly like unions nevertheless comply with the law so long as they treat all their employees—union and nonunion—alike.

See also Behring Int'l., Inc. v. *NLRB*, 675 F.2d 83, 87 (3d Cir. 1982). *But cf. NLRB* v. *Webb Ford*, 689 F.2d 733, 739 (7th Cir. 1982) (General Counsel must prove "that those proffered reasons were not the Company's true reasons for the discharge.").

When viewed in this context, *Mt. Healthy* does not furnish the easy generalizations and tallismatic approach ascribed to it by the *Wright Line* test. Rather, it established a broad formulation for ascertaining whether an individual has been punished for engaging in constitutionally protected activity. It required an aggrieved party to show that his discharge was substantially tainted by reliance upon protected activity and proposed an evidentiary standard for determining whether the discharge was in fact tainted by the exploitation of prohibited conduct by the employer. In outlining these concepts in sweeping fashion to meet the needs of a general constitutional claim, *Mt. Healthy* did not reject the possible distinction between an intermediate burden and an ultimate burden or the prospect that proof of a dominant motive was meaningful to gauge the actions of individuals as opposed to legislative or administrative bodies. This case provides a vehicle for the Court to fill in the interstices of *Mt. Healthy'* s broad brush formulation in the context of the NLRA.

The Courts that have rejected *Wright Line's* burden-shifting approach read *Mt. Healthy* to require the employer to bear the burden of proof on the ultimate issue, but find it inapposite for different reasons. The Third Circuit concluded that, unlike the pure constitutional question involved in *Mt. Healthy,* " the Board is bound by statutory limitations which foreclose the issue."[43] The First Circuit found *Mt. Healthy* factually distinguishable on the ground that the employer there *conceded* that the discharge took place in part for constitutionally protected activity. Thus, the "but for" test was not used, as it is in the typical labor case, to determine whether a violation occurred; but was employed to shift the burden in the context of "a true affirmative defense which went to the appropriateness of the remedy being applied rather than to the existence of a violation in the first instance."[44]

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[43] *Behrig Int'l., Inc.* v. *NLRB,* 675 F.2d 83, 88 (3d Cir. 1982)

[44] *NLRB* v. *Wright Line,* 662 F.2d 899, 906 (1st Cir. 1981). The court also held that the Board was precluded by statute from shifting the burden; but did not rest its distinction of *Mt. Healthy* on that ground, 662 F.2d at 904 & n.8.

We now will demonstrate that the Third Circuit's conclusion is compelled by the NLRA and its legislative history which require the General Counsel to shoulder the burden of proof throughout the proceeding. Upon that backdrop, we will show that the more realistic approach is to harmonize *Mt. Healthy* with the Court's Title VII decisions in order to develop a uniform standard for resolving dual motive discharge cases in a manner designed to balance the conflicting policies of the Act.

B. Burden of Proof Under the NLRA

It is undisputed that the General Counsel, in bringing the resources and prestige of the federal government to bear upon a private entity, carries the burden of proof in a Section 8(a)(3) case. The burden is imposed by the Board's regulations,[45] the Administrative Procedure Act,[46] and the decisional law.[47] The question is whether the NLRA permits that burden to shift to an employer so that he is compelled to disprove an *essential element* of the General Counsel's case.

In *NLRB v. Great Dane Trailors, Inc.*, 388 U.S. 26 (1967), this Court considered a situation in which an employer, as a matter of company policy, discriminated between strikers and non-strikers with regard to vacation pay. Relying on a series of prior decisions involving employer policies that, on their faces,

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[45] 29 C.F.R. § 101.10(b) provides that "[t]he Board's attorney has the burden of proof of violation of Section 8 of the National Labor Relations Act."

[46] 5 U.S.C. § 556(d) states that, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

[47] *See, e.g., NLRB* v. *Whitfield Pickle Co.*, 374 F.2d 576, 580 (5th Cir. 1967)(General Counsel's burden was to show that company discriminated because of union activity); Campbell & McLean, Inc., 118 NLRB 967, 971 (1957)(burden on General Counsel to establish discriminatory motivation, not on respondent to disprove it); Glen Raven Silk Mills, Inc., 101 NLRB 238, 240 (1952) *enf'd in part*, 203 F.2d 946 (4th Cir. 1953) (violation of NLRA must be proved by General Counsel by preponderance of the evidence).

displayed anti-union animus,[48] the Court constructed a two-tier test for examining motive under Section 8(a)(3). When the employer's policy is "inherently destructive" of the employee's statutory right to organize, the policy itself is demonstrative of motive and even the employer's business justification may be disregarded. When the impact on union activity is "comparatively slight," the Board must require proof of anti-union motive. In either situation:

> . Once it has been proved that the employer engaged in discriminatory conduct which would have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

388 U.S. at 34. (emphasis in text).

In allocating the burden, the *Great Dane* opinion focused on systemic policies of an employer which have no corresponding application to the discharge of a single employee.[49] "Where an overall policy concededly does discriminate against protected activity, the Board must balance the employer's justification against the employee's interest, and it may fairly require the employer to demonstrate the genuineness and strength of its asserted business reason. But here the issue is whether the discharge was in fact discriminatory—whether it was caused by protected activity or whether some other factor was opera-

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[48] *See American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 311-12 (1965) (lockouts during strike to compel union settlement); *NLRB* v. *Brown*, 380 U.S. 278, 290 (1965)(lockout during strike); *NLRB* v. *Erie Resistor*, 373 U.S. 321 (1963) (employing replacements during strike); *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938)(permanent replacements for strikers).

[49] *See* DuRoss, *supra* note 38, at 1127 (footnotes omitted):

> Although discharge of individual employees to discourage pro-union activity might be deemed so "inherently destructive" as to go "to the heart of the Act," the better view is that *Great Dane* has no application to the burden of proof in most mixed-motive discharge cases. Indeed, such a shift would be inconsistent with the Court's recent decisions involving employee discharge in first amendment and title VII cases.

tive."[50] Moreover, "*Great Dane* was not concerned with the difference between the burden of production and the burden of persuasion, and terms applicable to both are used interchangably throughout the opinion."[51]

When the *Great Dane* analysis is removed from the framework, the question is reduced to whether the Act authorizes the Board to allocate the burden of proof as it did in *Wright Line*. The Board contends that its allocation of the burden in *Wright Line* was no more than a restatement of its historic practices which have received judicial approval and congressional sanction. (Bd. Br. 14-22).

Contrary to the Board's assertion,[52] in the period antedating Taft-Hartley, the courts were not uniform in their assessment of the burden of proof question. While some opinions were in accord with the Board's claim that the Act placed the burden of proving a legitimate reason for the discharge on the employer,[53] others viewed the burden more in terms of an obligation to come forward with evidence[54] and a third category held that the burden of proof remained with the General Counsel. In the later category is *Interlake Iron Corp. v. NLRB*,

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[50] *NLRB* v. *Wright Line*, 662 F.2d 899, 904 n.8 (1st Cir. 1981) ("*Great Dane* has no application".); *see* Janofsky, *New Concepts In Interference And Discrimination Under The NLRA*, 70 Colum.L.Rev. 81, 96 (1970).

[51] *Behring Int'l., Inc.* v. *NLRB*, 675 F.2d 83, 89 (3d Cir. 1982). Justice Harlan's dissenting opinion in *Great Dane* indicated that it was impossible for him to determine whether the Court was imposing a burden of proof or a burden of production in the narrow class of cases under consideration. 388 U.S. at 38-39.

[52] As the Third Circuit has indicated: "Over the years we have observed that our decisions restricting the Board are rarely cited by it, no matter how perinent, a seeming symbolic bookburning difficult to ascribe to oversight." *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670 n.7 (3d Cir. 1979).

[53] *See, e.g., NLRB* v. *Barrett Co.*, 135 F.2d 959, 962 (7th Cir. 1943); *NLRB* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 546 (4th Cir. 1941).

[54] *See, e.g., Montgomery Ward & Co.* v. *NLRB*, 107 F.2d 555, 560 (7th Cir. 1939).

131 F.2d 129 (7th Cir. 1942), where Justice Minton, then a circuit judge, specifically held that "[t]he Board cannot shift the burden of proof or impose what it chooses to call the duty of the company to go forward with the evidence [as to cause] *** The company does not have to prove non-discrimination. The Board must prove discrimination because thereof. This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board." 131 F.2d at 133-34.[55]

In this state of judicial dissarray, Congress considered the 1947 Taft-Hartley Amendments to the Wagner Act. As previously indicated,[56] Congress was concerned with the ease with which the Board was sustituting inference for evidence in finding otherwise legtimate discharges improper because of the employee's union activities. Three changes were made to meet this problem: the Board's remedial authority to reinstate an employee discharged for cause, to the extent it was presumed to exist, was eliminated; the quantum of evidence upon which the Board could base an order was elevated from "all the testimony" to "a preponderance of the evidence"; and the standard for judicial review was altered to require deference only to those Board orders based on "substantial evidence" rather than, as the Wagner Act allowed, "all the evidence".

The Board focuses on certain legislative events that occurred during the evolution of these amendments to claim that Congress specifically authorized the burden-shifting rule of the *Wright Line* test. The scenario that the Board attempts to use to its own advantage developed as follows:

In the House draft of the bill, the following language appeared:

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[55] *See also NLRB* v. *Union Mfg. Co.*, 124 F.2d 332, 333 (5th Cir. 1941); *Martel Mills Corp.* v. *NLRB*, 114 F.2d 624, 631 (4th Cir. 1940).

[56] *See* Argument IB *supra*.

> If upon *the weight of the evidence* the Board shall not be of the opinion in the case of any person named in the complaint that such person has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint as to such person. * * * No order of the Board shall require the reinstatement of any individual as an employee, or the payment to him of any back pay, unless *the weight of the evidence* shows that such individual was not suspended or discharged for cause.[57]

Dissenting members of the House Committee, without intimating that the proposed language concerned a shifting burden of proof, objected to the amendments.[58] A compromise

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[57] I Legislative History of the Labor Management Relations Act, 1947 69 (NLRB 1948)(emphasis added)

[58] *Id.* at 382-84 (H.R. Rep. No. 245, 80th Cong., 1st Sess. 42, 91-93 (1947)):

> 3. *Weight of Evidence*
>
> Section 10(c) of the bill would amend section 10(c) of the National Labor Relations Act to provide that the National Labor Relations Board's findings must be based on the "weight of the evidence."
>
> If this proposed change means something more than a preponderance of evidence, it introduces an undesirable change in administrative procedure. The rule has uniformly been that an agency may rest its findings upon a preponderance of evidence. No proper reason exists to make an exception in the case of the National Labor Relations Board. The only effect of the proposal is to hinder the prevention of unfair labor practices by rendering the proof of such practices more difficult.
>
> • • •
>
> 6. *Discriminatory Discharges*
>
> The bill would amend section 10(c) of the National Labor Relations Act to provide that the Board may not order the reinstatement of any individual "unless the weight of the evidence shows that such individual was not suspended or discharged for cause."

(footnote continued on following page)

ultimately was reached in Conference Committee and the language was changed into that which is the current text of the Act:

> If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.[59]

The House Conference Report, probably the most definitive source of legislative intent,[60] did not contain the slightest indication that the Conference Committee's resolution of the dispute concerned a shifting burden of proof question:

(footnote continued from preceding page)

> This provision, like so many others in this bill, would shackle the National Labor Relations Board in the prevention of unfair labor practices. The Board, by its terms, would be required to find on "the weight of the evidence" not only that the discharge was in violation of the act but also that the discharge was not for cause. The effect of this provision is to permit an employer to escape liability for having discharged an employee for his union activities merely if grounds existed which would justify the employee's discharge. Since an employer can always find some reason for justifying the discharge, this proposal would render a nullity the protection afforded workers by the National Labor Relations Act against discrimination because of union activities. There is no reason why, if the proof shows that an employee has actually been discharged because of his legitimate union activities the employer should be allowed to escape the consequences of his unlawful conduct by pleading circumstances or conduct which he was perfectly willing to tolerate until the employee became active in a union.

[59] *Id.* at 13. The provision is now codified as 29 U.S.C. §160 (c).

[60] *See, e.g., Leedom* v. *Int'l. Union*, 352 U.S. 145, 149-50 (1956).

> The House bill also included, in section 10(c) of the amended act, a provision forbidding the Board to order reinstatement or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged for cause. The Senate amendment contained no corresponding provision. The conference agreement omits the "weight of evidence" language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause...will not be entitled to reinstatement.[61]

When the amended bill came to the Senate floor, Senator Taft, the Senate sponsor, engaged in an extensive colloquy with Senator Pepper, an ardent pro-labor opponent of the Taft-Hartley Amendments. Raising the shifting burden of proof issue for the first time in its legislative evolution, Senator Pepper claimed that, as he read the final version of the bill, "[t]he provision shifts the burden of proof to make the worker show he was discharged for union activities, rather than to make the employer show that the worker was discharged for cause." Senator Taft, under the erroneous assumption that the courts were uniform in upholding the Board's allocation of the burden, responded by stating that, while the House may have intended to alter the burden in its initial draft, under the "provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board."[62]

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[61] I Legislative History, *supra*, note 57, at 559 (H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55 (1947)).

[62] II Legislative History, *supra* note 57, at 1593-95 (93 Cong.Rec. 6518-19 (1947)). The entire exchange is also reproduced in *Zurn Industries, Inc.* v. *NLRB*, 680 F.2d 1683, 690-92 n.14 (9th Cir. 1982).

(footnote continued on following page)

Based upon these legislative activities, the Board contends that "Congress specifically approved the allocation of the burdens of proof reflected in the Board's standards...." (Bd.Br. 21-22). This argument totally ignores the fact that, in enacting Taft-Hartley, Congress was concerned with abuses committed by the Board and the facility with which it was utilizing inferences to order the reinstatement of employees discharged for legitimate business reasons.[63] The bill was passed to impose restrictions on the Board, not to truncate the General Counsel's obligation to prove his case.

Moreover, legislative intent is difficult to determine in the best of circumstances; here, as to the burden of proof question, it is virtually impossible. When an issue not referred to in the text of an act is raised for the first time in floor debate, and the sponsor responds by asserting that the bill is not intended to change existing law which, contrary to his expressed understanding, is in a state of disarray, the situation hardly evidences

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(footnote continued from preceding page)

Senator Taft's position was echoed by Senator Ball in urging an override of President Truman's veto of Taft-Hartley:

> [There] is an explicit provision inserted in the bill in conference, saying that if the employer proves to the satisfaction of the Board that he discharged an employee for cause, he cannot be held guilty of an unfair-labor practice in discharging him. That is exactly the rule which the courts now require the National Labor Relations Board to follow. In order words, if the National Labor Relations Board finds that an employer discharged an employee for cause, they cannot find him guilty of an unfair-labor practice, and it is up to the Board to make the decision.

II Legislative History, *supra* note 57, at 1640 (93 Cong. Rec. 7529 (1947)). Obviously, the bill contained no "explicit provision" of the type contemplated by Senator Ball; and the Board's reliance on his remarks omits the erroneous premise upon which he relied. (Bd. Br. 20).

[63] "All history demonstrates that legislation intervenes only when a definite abuse has disclosed itself, through the excess of which public feeling has finally been aroused." B. Cardozo The Nature of the Judicial Process 144 (1921).

congressional approval of a particular interpretation of the statute.[64] For this reason, all of the courts that have considered the question have found "the legislative history as well as the statutory language inconclusive on the question of burden of proof."[65]

The circuits part company on whether the Board's shifting burden rule is a reasonably defensible interpretation of the Act[66] or a pure question of law that is inconsistent with the text of the Act.[67] Under this Court's decisions, a reasonably defensible construction of the statute by the Board is accorded deference even though the courts may have perferred a different approach.[68] However, the Board's interpretation must be rejected when it has no reasonable basis in law, "either because the proper legal standard was not applied or because the Board

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[64] "A loose statement even by a chairman of a committee, made impromptu in the heat of debate, less informing in cold type than when heard on the floor, will hardly be accorded the weight of an encyclical." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 543 (1947).

[65] *NLRB* v. *Wright Line*, 662 F.2d 899, 904 n.8 (1st Cir. 1981); *see also Zurn Industries* v. *NLRB*, 680 F.2d 683, 693 (9th Cir. 1982); *Behring Int'l., Inc.* v. *NLRB*, 675 F.2d 83, 90 n. 6 (3d Cir. 1982). Judge Breyer, concurring below, did not find the intent of Congress inconclusive; he believes that the statutory language and congressional intent "indicate quite clearly that the Board, not the employer, must bear the overall burden of showing a violation of the Act." *NLRB* v. *Transportation Mgt. Corp.*, 674 F.2d 130, 133 (1st Cir. 1982).

[66] *See Zurn Industries* v. *NLRB*, 680 F.2d 683, 693 (9th Cir. 1982); *NLRB* v. *Fixtures Mfg. Corp.*, 669 F.2d 547, 550-51 n. 4 (8th Cir. 1982).

[67] *See Behring Int'l. Inc.* v. *NLRB*, 675 F.2d 83, 90 n.6 (3d Cir. 1982); *NLRB* v. *Transportation Mgt. Co.*, 674 F.2d 130, 133 (1st Cir. 1982) (Breyer, J., concurring); *NLRB* v. *Wright Line*, 662 F.2d 899, 904 n.8 (1st Cir. 1981).

[68] *See, e.g., Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496-97 (1979); *NLRB* v. *Iron Workers*, 434 U.S. 335, 350 (1978).

applied the correct standard but failed to give the plain language of the standard its ordinary meaning."[69]

In this case, as in *Packard Motor Co. v. NLRB*, 330 U.S. 485, 492 (1947), there is "no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law." The Board is compelled to dismiss a complaint unless it is convinced of a violation by a preponderance of the evidence. 29 U.S.C. § 160(c). Federal administrative agencies are compelled by law to carry the burden of proof when they issue complaints against citizens. 5 U.S.C. § 556(d). The Board's own regulations acknowledge its burden of proof. 29 C.F.R. § 101.10. In these circumstances "there is little need to consult the legislative history because the statute is clear on the General Counsel's burden of proof and the Board's regulation is a significant expression of agreement on that point."[70]

Moreover, in the absence of a specific allocation of the burden by Congress, which the NLRA clearly does not contain, the *Federal Rules of Evidence* prohibit the shifting burden provision of *Wright Line*. Rule 301 provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

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[69] *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979); see *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971); *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965).

[70] *Behring Intl., Inc.* v. *NLRB*, 675 F.2d 83, 90 n.6 (3d Cir. 1982); *see also NLRB* v. *Transportation Mgt. Corp.*, 674 F.2d 130, 133 (1st Cir. 1982) (Breyer, J., concurring) ("How, in the face of this language, is it possible not to hold that the overall burden of proving a violation remains with the Board?").

The General Counsel's prima facie case, operating in the manner of a presumption, may shift the burden of production to the employer; but, under the Rule, it cannot shift the burden of proof.

This is made manifest by the evolution of the Rule. As submitted by the Court, the presumptions governed by the Rule were given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact once the party invoking the presumption established the basic facts giving rise to it. Thus, the original rule was tantamount to the *Wright Line* shifting burden principle. However, the House Judiciary Committee, instead of imposing a burden of persuasion on the party against whom the presumption was directed, adopted a provision which shifted the burden of going forward with the evidence and further provided that, notwithstanding contradicting evidence, "a presumption is sufficient evidence of the fact presumed, to be considered by the trier of fact." The Senate Judiciary Committee believed that the House's middle ground position still gave too much weight to a presumption and amended the Rule into the form in which it was enacted. The Committee Report stated:

> The effect of the rule as adopted by the Committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden of persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.[71]

In fashioning Rule 301, Congress expressly repudiated the approach taken by the Board in *Wright Line*.

Because the NLRA does not authorize the Board to compel an employer to shoulder the burden of proof, the

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[71] D.Louisell & C.Muller, I Federal Evidence 515-17 (1977) (tracing the legislative history of Rule 301).

Wright Line shifting burden principle is beyond the authority of the Board.

C. The Appropriate Procedure: The Title VII Cases.

1. The *Burdine* Formulation.

As we previously have indicated, the scope of this case is not confined to a resolution of whether *Mt. Healthy* is distinguishable from NLRB practices on statutory grounds. Because the degree of anti-union animus necessary to sustain reinstatement is interrelated with the appropriate allocation of the burden of proof, the magnitude of the burden must be defined if the allocation of the burden is to be meaningful in practice.[72] Thus, the proper disposition of this case depends upon an accommodation of the principles on which *Mt. Healthy* is based and those governing the NLRA's application to single employee discharges. This will provide the Board with an appropriate standard for resolving the multitude of mixed motive discharge cases that it annually must confront and, at the same time, will provide employers and union employees throughout the nation with sufficient certainty to guide their respective courses of conduct.

The appropriate framework for the disposition of single employee mixed-motive discharge cases under the NLRA has been supplied by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and the authorities upon which it is based. In *Burdine*, a Texas state employee claimed that her discharge from a federally funded job placement program was based on gender discrimination in violation of Title VII.[73] The

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[72] *See* Enright, *The Motivation Requirement In Single Employee Discharge Cases*, 11 Loyola U.L.J. 501, 516 (1980)("Resolving the current conflict over the standard to be applied in single employee mixed-motive discharge cases will require careful consideration of both the underlying policies served by the Act and the practical problems of allocating the burden of proof in a complaint case.")

[73] Title VII of the Civil Rights Act of 1964 is codified in 42 U.S.C. § 2000e *et seq.*

district court found that Burdine's supervisor provided a rational explanation for the discharge; but the Fifth Circuit reversed, holding that the defendant carries the burden of proving by a preponderance of the evidence that there was a legitimate, nondiscriminatory reason for the discharge.[74]

In a unanimous opinion, this Court reversed the Fifth Circuit's allocation of the burden and held that the ultimate factual question must be resolved through a three-stage analysis:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

450 U.S. at 252-53 (citations omitted). The Court specifically deliniated the nature of the burden and the party on whose shoulders it rested:

> The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

450 U.S. at 253.

Further developing the three-stage analysis, the Court outlined the parties' respective burdens. In the first stage, "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." The plaintiff must demonstrate

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[74] *Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563, 567 (5th Cir. 1979).

qualification for the position and rejection "under circumstances which give rise to an inference of unlawful discrimination."[75] The prima facie case produces a legally mandatory, rebuttable presumption of discrimination.[76]

Once the plaintiff's prima facie case generates a presumption of discrimination, the defendant is compelled to produce evidence, in the second stage, to rebut the presumption. The defendant may fulfill its burden of production with evidence sufficient to raise "a genuine issue of fact as to whether it discriminated against the plaintiff." To accomplish this, the defendant must come forward with admissible evidence that is legally sufficient to justify judgment in its favor. Thus, defendant is obligated to present evidence that discloses a legitimate reason for its action and frames the issue with sufficient clarity to enable the plaintiff to demonstrate pretext. At this point, "the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." 450 U.S. at 255 (footnote omitted).

In the third stage, the plaintiff, retaining the burden of persuasion, must demonstrate that the proffered reason was not the true reason for the employment decision.[77] "This burden

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[75] 450 U.S. at 254. The scope of the plaintiff's burden in the first stage is at issue in United States Postal Service Bd. of Governors v. Aikens, No. 81-1044 (argued 11/9/82).

[76] The Board contends that "[n]o similar presumption of discriminatory motivation has been established in Board practice." (Bd. Br. 39 n.26). However, the *Wright Line* tests shifts the burden upon the General Counsel's establishment of a "prima facie case." *Burdine* recognized that the phrase "prima facie case" could mean both a presumption and sufficient evidence to infer the fact at issue. While *Wright Line* apparently uses the phrase in the later context, *Burdine* made it clear that, in the Title VII context, a prima facie case was tantamount to a presumption. 450 U.S. at 254 n.7.

[77] This is precisely the same burden that the Seventh Circuit, without regard to a three stage analysis, has imposed on the Board in NLRA cases. *NLRB* v. *Webb Ford*, 689 F.2d 733, 739 (7th Cir. 1982). *See also Firestone Tire & Rubber Co.* v. *NLRB*, 539 F.2d 1335,

(footnote continued on following page)

now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." 450 U.S. at 256. It may be discharged by rebuttal evidence or, without additional testimony, by discrediting the defendant's case through cross-examination.

In this manner, *Burdine* provides a meaningful formulation for refining the factual issues in a Title VII case and represents the culmination of a studied development of the issues.[78] Because the ultimate issue in a Title VII case—whether an employer has intentionally discriminated against an employee (or job applicant) by relying on prohibited reasons for an employment related action—is precisely the same as that involved in an NLRA discharge case, the *Burdine* analysis is uniquely suited to the NLRA context.[79] For this reason, the courts uniformally have found *Burdine* applicable to mixed motive discharges under the NLRA.[80]

(footnote continued from preceding page)

1337 (4th Cir. 1976) (Pre-*Wright Line* decision requiring the General Counsel to offer affirmative and persuasive reasons why the employer rejected the good reason and chose the bad one).

[78] *See also Bd. of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978); *Teamsters* v. *United States*, 431 U.S. 324 (1977); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

[79] *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 803-04 (1973) (citing *NLRB* v. *Fansteel Metal Corp.*, 306 U.S. 240, 255 (1939)). *Cf. Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 769-70 (1976).

[80] *See Behring Int'l., Inc.* v. *NLRB*, 675 F.2d 83, 88-89 (9th Cir. 1982); *NLRB* v. *Wright Line*, 662 F.2d 899, 907 (1st Cir. 1981). In *Zurn Industries, Inc.* v. *NLRB*, 680 F.2d 683, 689 (9th Cir. 1982), the court, unlike the First and Third Circuits, did not require the Board to adopt the *Burdine* format:

> Although the *Burdine* approach would be a permissible implementation of the Act's purposes, we conclude that the *Mt. Healthy* approach used in the Board's *Wright Line* decision is within the Board's authority to adopt.

The Board contends that *Burdine* is inapposite for two reasons. First, the Board claims that "[t]he showing made by the General Counsel in order to sustain his burden under the *Wright Line* test is essentially the same as the Title VII plaintiff's conclusive proof of the ultimate finding of fact of the employer's discriminatory motive." (Bd.Br. 40). Second, the Board suggests that the only appropriate Title VII analogy to the *Wright Line* test is found in those decisions "that address the procedure to be used after a plaintiff establishes discrimination." (Bd.Br. 40). We will consider these issues in reverse order to supply the appropriate context.

2. The Title VII Remedial Phase Analogy.

In asserting that the *Wright Line* burden does not shift until the discharge hearing reaches a stage that resembles a Title VII remedial proceeding, the Board misconceives the thrust of this Court's Title VII doctrine. The Court has recognized that different theories potentially may apply to the infinite variety of factual patterns that can emerge under Title VII. The Board's argument confuses the application of these theories in the context of a single employee mixed-motive discharge case.

Burdine and its antecedents, beginning with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), apply to a situation in which an employer is alleged to have covertly relied upon a prohibited reason to treat the aggrieved party differently than others similarly situated.[81] The issues under consideration in

[81] A second line of cases, beginning with *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), concerns employer policies that are overtly discriminatory or "facially neutral" but discriminatory in their impact. In these circumstances, proof of discriminatory motive is not required: and the employer may avoid liability by establishing, through an affirmative defense, that the policy is justified by business necessity even though it is concededly discriminatory. *See, e.g., Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 143 (1977); *Donald* v. *Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 412-13 (1975). This line of cases presents a Title VII analogy to the Court's *Great Dane* approach in the NLRA context.

these decisions involved "the order and allocation of proof in a private, non-class action challenging employment discrimination." 411 U.S. at 800. Although those issues appear to have the most bearing on a single employee mixed-motive discharge, other theories of proof have been deemed acceptable to satisfy the prima facie burden in disparate treatment cases under Title VII. One of the theories of proof that has been recognized in this regard is the "pattern and practice" method.

When employed in a disparate treatment case, pattern or practice represents an effort to prove discriminatory motive by inference. Thus, in the liability phase of the proceeding, the plaintiff need not show that any employee or applicant was a victim of discrimination, but may establish a prima facie case by demonstrating that unlawful discrimination was a regular procedure or policy of the employer.[82]

When an unrebutted policy of unlawful discrimination is shown to exist, the liability phase is completed and relief for individual victims is sought in the remedial phase of the proceedings. At that point, usually the second half of a bifurcated trial, the burden of proof is "on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."[83]

Here, the Board attempts to force a classic *Burdine McDonnell Douglas* private non-class action involving discriminatory treatment into the mold of the class action pattern and practice cases.[84] The critical flaw in the Board's argument is the fact that proof of anti-union animus in a single employee mixed motive discharge case bears no resemblance to proof of

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[82] *See generally Teamsters* v. *United States*, 431 U.S. 324, 360-62 (1977).

[83] *Teamsters* v. *United States*, 431 U.S. 324, 362 (1977); *see Franks* v. *Bowman Transporation Co.*, 424 U.S. 747, 773 n.32 (1976).

[84] *See Teamsters* v. *United States*, 431 U.S. 324, 362 (1972); *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 404 n.9 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772-73 (1976).

pattern or practice in a disparate treatment case. In the *Burdine* situation, as here, the question is whether protected activity was the real motive causing an employer to discriminate against a particular employee by discharging him; in the disparate treatment cases involving a pattern and practice theory of proof, the question is whether the employer's procedures over the course of time generally have involved unlawful discrimination.

Thus, the remedial phase of a Title VII case is not the same as the point at which the *Wright Line* burden shifts. In the remedial phase, the employer already has lost on the merits of its claim that its policies were not discriminatory, and the law of the case would preclude relitigation of those contentions. The sole question in the remedial phase is whether the discriminatory policies operated to damage a particular victim. Accordingly, the burden shifts to the employer to prove that they did not.[85]

The issue in this case is whether the discharge was in fact discriminatory. The Board's argument fails to recognize that under Title VII, unlike under the NLRA, "the questions of statutory violation and appropriate statutory remedy are conceptually distinct."[86] Under *Burdine*, the burden of proof does not shift until discrimination has been conceded or proven.[87] To shift the burden "before liability has been established would be

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[85] *See Patterson* v. *Greenwood School Dist. 50*, 30 FEP Cases 825, 826 (4th Cir. 1982).

[86] *Smith* v. *Secretary of the Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981); *see Milton* v. *Weinberger*, 30 FEP Cases 913, 917 (D.C. Cir. 1982) ("A plaintiff whose *right* to protection from discrimination has been violated still may be denied a full *remedy*").

[87] Because the defendant in *Mt. Healthy* conceded that protected activity was part of the reason for the discharge, the burden of proof allocation in that case was consistent with a remedial proceeding under Title VII. The burden shift was used in *Mt. Healthy* as a mechanism for determining whether a remedy was appropriate, not, as the Board would use it here, to determine whether discrimination existed.

contrary to the well-established principle that the ultimate burden of persuasion remains at all times with the plaintiff."[88]

The Board's misunderstanding of the Title VII doctrine is confirmed by its failure to distinguish between the intermediate and ultimate burdens that an application of the Title VII decisions to this context would impose upon the General Counsel in order to justify reinstatement. Therefore, we turn to the substantive scope of the General Counsel's burden.

3. The Ultimate Burden: Dominant Motive.

Wright Line's assessment of the substantive scope of the General Counsel's burden of proof represents a misreading of *Mt. Healthy;* and the error is compounded by the Board's claim that the satisfaction of this standard constitutes proof of "the ultimate fact of discriminatory motive...." (Bd.Br. 40). *Mt. Healthy* required plaintiff to prove that the protected conduct was "a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him." 429 U.S. at 287. Despite the clear expression in *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 416 (1979), that the requisite burden of proof demanded evidence that "protected conduct played a substantial role in the employer's decision," the Board has chosen to ignore the substantiality requirement.

Rather than reading "motivating" as synonymous with "substantial", the *Wright Line* test equates proof that protected conduct was "a motivating factor" in the discharge with proof that it was "in part" the reason for the discharge. Thus, before *Wright Line*, the General Counsel was compelled to prove that protected activity was "in part" the cause of the discharge; now, he is required to prove protected activity was "a motivating factor" in the discharge. Despite paying lip service to *Mt. Healthy's* rejection of the "in part" test, the Board, through the use of word games, has offered a distinction without a difference.

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[88] *Milton* v. *Weinberger*, 30 FEP Cases 913, 917 (D.C. Cir. 1982).

In this case, it is imperative that deference be paid to Justice Frankfurter's admonition that, "[i]t is part of wisdom, particularly for judges, not to be victimized by words."[89] The history of mixed motive discharge cases in opinions of both the Board and the circuit courts indicates a fruitless search for talismatic terminology that, when measured against the evidence, will somehow magically divine the true reason for the discharge.[90] This has created a chaotic state in which confusion reigns among Board ALJ's; and neither employers nor union employees have reasonable guidelines to govern the manner in which they must conduct themselves. To correct this situation, it is essential to recognize that "formalism itself presents a danger, and cannot be a substitute for hard analysis".[91]

A mechanism designed to generate hard analysis in mixed motive discharge cases must begin with a clear division of the respective burdens of proof. Contrary to the Board's claim that the General Counsel's *Wright Line* burden is "comparable to what the Title VII plaintiff ultimately proves at the completion of the third step of the *Burdine* inquiry" (Bd.Br.40), reinstatement often has been ordered in:

> circumstances that are logically and temporally unrelated to the state of mind of the decisionmaker at the time of the discharge decision. Noncoercive expressions of union hostility, commission of other unfair labor practices, post-discharge declarations, knowledge of pro-union activities, inconsistent application of employment policies, and several rather than one explanation for discharge often serve in various combinations to create an unrebuttable basis for a finding of a partially discriminatory motive.[92]

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[89] *Shapiro* v. *United States*, 335 U.S.1, 56 (1948) (dissenting opinion). The concept evolved from Justice Holmes' observation that "[w]e must think things not words...." Holmes, *Law In Science And Science In Law*, 12 Harv.L.Rev. 443, 460 (1899).

[90] See authorities cited in notes 18 to 23 *supra*.

[91] *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670 n.4 (1st Cir. 1979).

[92] DuRoss, *supra* note 38, at 1128-30 (footnotes omitted).

Thus, the Board's historical practice discloses a burden of proof that resembles the Title VII plaintiff's intermediate burden rather than his ultimate burden.

As the Court recognized in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978):

> We think the Court of Appeals went awry, however, in apparently equating a prima facie showing under McDonnell Douglas with an ultimate finding of fact as to discriminatory refusal to hire under Title VII; the two are quite different and that difference has a direct bearing on the proper resolution of this case.

In fashioning an appropriate formulation for the resolution of mixed motive discharges, a clear division of the intermediate and ultimate burdens is necessary to promote "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." 438 U.S. at 577.

A division of the burden in the manner contemplated by the Title VII decisions will provide a framework of analysis that comes as close as any evidentiary system can to ascertaining the real motive behind the discharge. The General Counsel's intermediate burden would require proof that the protected activity was "a motivating factor" in the discharge. In *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670 (1st Cir. 1979), Judge Aldrich outlined the manner in which that burden could be sustained:

> The first difficulty may be in deciding whether a bad reason existed at all, one step being whether the company had the requisite knowledge of union activity. Once that knowledge is established, the bad reason may be shown by independent evidence, or by the circumstances of the discharge itself. On rare occasions an employer may even admit to unlawful motivation, but the usual case of independent proof is by showing other acts apart from the discharge that indicate unlawful antiunion animus. Suspicions arising from the fact that a union supporter was fired

> in itself are not enough. Nor is employer gratification arising from realization that its action will harm the union. Dislike of unions is not uncommon among employers, and not only do principles of free speech permit it to be voiced, but so does section 8(c) of the Act.
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> * * *
>
> Rather, the employer must have exhibited opposition not merely to the union, but to lawful activity by its employees in pursuit of their objectives. We note, moreover, that other labor law violations do not "'automatically make a discharge an unlawful one.'"
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> * * *
>
> The circumstances must be viewed as a whole.

(footnotes and citations omitted).[93]

Once the General Counsel introduces admissible evidence of this nature to demonstrate that protected activity was a motivating factor for the discharge,[94] a prima facie case would be established and the employer, consistent with *Burdine*, would be presented with two options: discredit that evidence or carry a burden of production. Under the second option, the employer would be compelled to come forward with evidence that it had a legitimate reason for the discharge.[95]

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[93] To the extent that *Eastern Smelting* can be read to impose a burden of proof on the employer, it was overruled—but only in that narrow vein—in *NLRB* v. *Wright Line*, 662 F.2d 899, 905 n.10 (1st Cir. 1981).

[94] It is worth noting that the prima facie case cannot be built upon evidence of protected anti-union speech. *See, e.g., NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *NLRB* v. *Colvert Dairy Products Co.*, 317 F.2d 44, 46 (10th Cir. 1963); *Coppus Eng'r'g. Corp.* v. *NLRB*, 240 F.2d 564, 571 (1st Cir. 1957).

[95] While the scope of the burden is the same as that articulated in *Mt. Healthy*, it is a burden of production rather than persuasion because of its role in determining whether discrimination existed rather than, as in *Mt. Healthy*, in determining whether concededly

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To fulfill the statutory burden, the General Counsel should then be required to prove that the real reason for the discharge was the employee's protected activity. This, of course, can be established by demonstrating that the reason proffered by the employer was a pretext. As Judge Aldrich explained:

> If an employer asserts an obviously weak or implausible good reason, or one manifestly unequally applied, this may support an inference that there was a bad reason. But where the burden is on the Board, except in such clear cases the mere fact that the Board considers the asserted good reason less than compelling will not suffice. . . .[96]

Because "the Board all too often has either disregarded altogether the valid reasons for the employer's conduct, or has labeled the good reason pretextual, although it was apparent that it was a good reason of substance,"[97] we believe that the General Counsel's ultimate burden should require him to show that the employee's protected activity was the employer's "dominant" motive for the discharge. Whether it is characterized as a dominant, primary or superior motive, the degree of anti-union animus necessary to satisfy the ultimate burden must be expressed in such terms as to assure that the fact-finder searches for the true motivation of the employer.

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existing discrimination should be punished. See note 87 *supra*. The nature of the showing necessary to transfer the *Mt. Healthy* burden in a non-NLRA case is at issue in *Connick* v. *Meyers* (No. 81-1251) (argued 11-8-82).

[96] *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670-71 (1st Cir. 1979); *see NLRB* v. *Charles Batchelder Co., Inc.*, 646 F.2d 33, 43 (2d Cir. 1981) (Newman, J., concurring).

[97] *NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979). *See also* DuRoss, *supra* note 38, at 1130: "Indeed, a violation will be inferred unless the asserted cause for discharge is not pronounced "trivial", no evidence of union animus is apparent, and the employer has little or preferably no knowledge of the dischargee's pro-union activity". (footnote omitted).

If the intermediate-ultimate burden dichotomy is to serve the important analytical function that *Burdine* intended it to have, the scope of the respective burdens must be defined. While the intermediate burden may be satisfied upon a showing that the protected activity was a motivating factor in the discharge, the evidence admitted on management's behalf to meet the prima facie case, if credited, will restore the equipoise. There will be two motives for the discharge in evidence; and the party that carries the burden must establish that the "bad" reason predominated.

In order to sharpen the analysis, the substantive scope of the General Counsel's ultimate burden should require proof that the employee's protected activity supplied the employer's dominant motive for the discharge. The reasons that gave rise to a dominant motive test correspond to the rationale of *Mt. Healthy;*[98] and the lower courts' subsequent retreat from dominant motive principles has been based upon the erroneous assumption that *Mt. Healthy* created a "but for" test.[99] However, as we have shown, the constitutional test of causation

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[98] *See NLRB* v. *Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (1st Cir. 1963)(Aldrich, J., concurring):

> Where a party has two motives, one permissible and the other impermissible, the better rule is ... that the improper motive must be shown to have been the dominant one. Otherwise there is a danger that knowledge that something will have a pleasing result will be confused with, and substituted for, actuating motive. This is a particular danger in labor cases because once an anti-union animus has been shown it is always easy, no matter how valid a proper cause for discharge may have existed, to say that "one" of the motives was the animus. This would lead to what we believe occurred here, that a militant union man would feel that he could safely behave as he chose.

(citations omitted). *Mt. Healthy* used similar language to reject an "in part" test. 429 U.S. at 285-86.

[99] *See NLRB* v. *Wright Line*, 662 F.2d 899, 903 (1st Cir. 1981) ("In cases since *Mt. Healthy*, we have relied on its expression of the 'but for' standard, abandoning our earlier 'dominant motive' language.").

developed by *Mt. Healthy* was predicated upon analogous authorities that had rejected a "but for" test. Thus, *Mt. Healthy's* requirement that the discharge be substantially motivated by protected activity is consistent with an ultimate burden demanding proof of a dominant motivation.[100]

The functional utility of a dominant motive approach is confirmed by Wigmore's concept of "equipoise":

> [A] 'prima facie' case ... need not be overcome by a preponderance of the evidence, or by evidence of greater weight; but the evidence needs only to be balanced, put in equipoise, by some evidence worthy of credence; and, if this be done, the burden of the evidence is met and the duty of producing further evidence shifts back to the party having the burden of proof. . . .[101]

To overcome the "equipoise" which, almost by definition, applies to a dual motive discharge case in which two reasons—one acceptable and one condemned—caused a discharge, it is incumbant upon the party who carries the burden to affirmatively show that the prohibited reason was the real reason for the discharge. The most sensible analytical approach to disengage the equipoise is provided by resort to consideration of the dominant motive.

Finally, dominant motive analysis will facilitate the judiciary's ability to discharge its function of confining administrative agencies to their statutory limitations. In the Administrative Procedure Act, Congress specifically authorized the courts to guard against the arbitrary exercise of administrative discretion[102] and the use of conclusions drawn from unsup-

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[100] *See* DuRoss, *supra* note 38, at 1112-13.

[101] J. Wigmore Evidence § 2487, at 282 (3d ed. 1940); *see NLRB v. Transportation Mgt. Corp.*, 674 F.2d 130, 133 (1st Cir. 1982) (Breyer, J., concurring) ("the Board and court apparently do not agree about who should win if, after both sides have submitted their evidence, the evidence is in 'equipoise.").

[102] 5 U.S.C. § 706.

ported inferences.[103] The legislative history of Taft-Hartley confirms the import of these principles in the NLRA context. Nonetheless, under existing Board practices "the stated reasons for unlawful discharge conclusions currently rest in material part on inferences drawn from circumstances, such as after-the-fact declarations, which are neither probative of the employer's motive at the time of the discharge decision nor strictly related to the employer-employee predischarge relationship. Because these reasons are unrelated to the elements of the statutory violation, such explanations do not have a rational basis in law and thus fail to conform to [the Administrative Procedure Act]. Adoption of the dominant motive standard will directly encourage rational decisions and thereby assure adherence to this statutory requirement."[104]

Thus, dominant motive analysis will put in practice this Court's acknowledgement of the undisputed principle that "the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons that . . . intimidation and coercion."[105]

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[103] 5 U.S.C. § 557(c)(3).

[104] DuRoss, *supra*, note 38, at 1131 (footnote omitted).

[105] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937).

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be vacated and the case remanded to that Court with instructions to return it to the Board for a determination of whether (1) the General Counsel satisfied his intermediate burden of proving that the employee's protected activity was a motivating factor for the discharge; (2) the employer came forward with sufficient evidence to put the prima facie case in equipoise; and (3) the General Counsel discharged his ultimate burden by proving that the protected activity was the dominant motive for the discharge.

Respectfully submitted.

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NO. 82-168

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM 1982

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

TRANSPORTATION MANAGEMENT CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION OF NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE, AND BRIEF OF AMICI CURIAE, NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS IN SUPPORT OF RESPONDENT.

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ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals for the First Circuit properly concluded that the burden to be placed on an employer in a proceeding pursuant to Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3), is that of producing credible evidence to rebut or neutralize the General Counsel's prima facie case, and not that of overcoming the prima facie case?

MOTION OF NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Pursuant to Rule 36.1 of the Rules of the Supreme Court, the New England Legal Foundation and the Associated General Contractors of Massachusetts move this Court for leave to file their brief amici curiae, bound with this motion, in support of respondents.

New England Legal Foundation (NELF) is a non-profit, public interest law foundation, organized and existing under the laws of the Commonwealth of Massachusetts, for the purpose of engaging in litigation on matters affecting the economic interests of the people and businesses of New England. NELF has long been interested and involved in the statutory construction of, and the public policy issues surrounding, the National Labor Relations Act and the appropriate legal standards for determining a violation of the Act. The Foundation has consistently supported the proposition that a proper balance between the rights and interests of employers and employees is

essential to the operation of our free enterprise system.

Associated General Contractors of Massachusetts (AGC) represents the leading general contracting firms engaged in the construction industry in the Commonwealth of Massachusetts. AGC's membership of 236 Massachusetts firms performed approximately 75 percent of the construction work carried out in Massachusetts during 1982, representing a value in excess of $1 billion. The association includes both union and open-shop contractors, and its members are engaged in work for both the public and private sectors. AGC represents the interests of its general contractor members in important matters affecting those interests before the courts, legislative bodies, and state and federal regulatory agencies. Many employees of AGC member firms regularly engage in activity which is protected under the National Labor Relations Act, and AGC and its members are actively concerned with the

issues raised in the instant litigation.

Amici support the rights of employees to engage freely in protected activity, but also strongly endorse the rights of employers to determine the terms and conditions of employment. The success of businesses operating in the free enterprise system depends in large measure upon striking the appropriate balance between these often competing interests. Claims of unfair labor practices can, if unfounded, severely impair the ability of a private enterprise to manage its work force in the most efficient and effective manner.

Amici's public interest perspective, combined with its broad experience in matters which effect the economic vitality of New England, will provide this Court with a point of view which might not otherwise be presented in the instant case.

For the foregoing reasons, New England Legal Foundation and Associated General Contractors of Massachusetts pray that this Court

grant its motion for leave to file the accompanying brief amici curiae in support of the Respondent.

By their Attorneys,

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STATEMENT OF INTEREST OF AMICI CURIAE

New England Legal Foundation (NELF) is a non-profit, public interest law foundation, organized and existing under the laws of the Commonwealth of Massachusetts, for the purpose of engaging in litigation on matters affecting the economic interests of the people and businesses of New England. NELF has long been interested and involved in the statutory construction of, and the public policy issues surrounding, the National Labor Relations Act and the appropriate legal standards for determining a violation of the Act. The Foundation has consistently supported the proposition that a proper balance between the rights and interests of employers and employees is essential to the operation of our free enterprise system.

Associated General Contractors of Massachusetts (AGC) represents the leading general contracting firms engaged in the construction industry in the Commonwealth of Massachusetts. AGC's membership of 236 Massachusetts firms performed approximately 75

percent of the construction work carried out in Massachusetts during 1982, representing a value in excess of $1 billion. The association includes both union and open-shop contractors, and its members are engaged in work for both the public and private sectors. AGC represents the interests of its general contractor members in important matters affecting those interests before the courts, legislative bodies, and state and federal regulatory agencies. Many employees of AGC member firms regularly engage in activity which is protected under the Fair Labor Standards Act, and AGC and its members are actively concerned with the issues raised in the instant litigation.

The amici support the rights of employees to engage freely in protected activity, but also strongly endorse the rights of employers to determine the terms and conditions of employment. The success of businesses operating in the free enterprise system depends in large measure upon striking the appropriate balance

between these often competing interests. Claims of unfair labor practices can, if unfounded, severely impair the ability of a private enterprise to manage its work force in the most efficient and effective manner. The amici believe that the Congress, in its specific statutory reference to the allocation of the burden of proof in such cases, and the First Circuit Court of Appeals, in the interpretation of the statutory standard and the relevant case precedent, have struck the proper balance. The amici support the decision of the court below.

STATEMENT OF THE CASE

The National Labor Relations Board sought enforcement against the Transportation Management Corporation of an order based upon Board findings that the company violated Section 8(a)(1) and Section 8(a)(3) of the National Labor Relations Act. 29 U.S.C. §151, et seq. In an opinion reported at 674 F. 2d 130 (April 1, 1982), the United States Court of Appeals for the First Circuit, while acknowledging that several of the findings of violations of the Act were adequately supported by the record, declined to enforce the Board's order. The Court found that the Board had not based its conclusion of a violation upon the preponderance of the testimony taken. Rather, the Court concluded, the basis for the Board's finding was its determination that the company had failed to meet its burden of overcoming the General Counsel's prima facie case by establishing by competent evidence that the employee would have been discharged even absent his union activity.

Since the Court was of the opinion that the Board had imposed a burden of proof upon the Company which was outside its statutory authority, the Court remanded the case to the Board for reconsideration under the standard of NLRB v. Wright Line, 662 F. 2d 899 (1st Cir. 1981).

Following the entry of the judgment of the Court of Appeals on April 1, 1982, the NLRB filed a petition for a writ of certiorari. The petition was filed on July 30, 1982 and was granted on November 15, 1982.

SUMMARY OF ARGUMENT

The National Labor Relations Act is designed to strike a balance between an employee's right to engage in union activity and an employer's right to select its employees, to discipline them, and to discharge them. In order to maintain a balance between these competing rights, the Act requires that the General Counsel of the NLRB bear the burden of proof of a violation of the Act, and the employee bear the burden of producing credible evidence to justify the discharge of an employee.

A. Section 10(c) of the National Labor Relations Act imposes the burden of persuasion in an unfair labor practice case on the General Counsel. This provision is reinforced by the Board's own regulations and by Section 7(c) of the Administrative Procedures Act. While the National Labor Relations Board cites to certain legislative history as indicating that an employer bears a burden of proof in Section 8(a)(3) cases, there is no need to look to such legislative history

when the pertinent statutes are clear on their face. Furthermore, the cited legislative history is contradictory and, thus, is incapable of providing further clarification of a statute whose terms are already plainly self-evident.

B. While the Board's adoption of the Wright Line "but for" test in dual motive section 8(a)(3) cases is substantively correct, its reliance on Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), as grounds for placing a burden of proof on an employer is in error. Mt. Healthy is distinguishable from section 8(a)(3) cases on both statutory and factual grounds. In that action the employer admitted its violation of an employee's rights under 42 U.S.C. §1983, and raised an affirmative defense on which it appropriately bore the burden of proof. In the instant action, the employer is not raising an affirmative defense to the appropriateness of a remedy, but is instead denying the existence of any violation.

In reviewing the statutory mandate placed on the General Counsel by the National Labor Relations Act and other provisions of law, and the legal and factual discrepancies with Mt. Healthy, the Court of Appeals properly concluded that the procedure articulated in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) should be applied in section 8(a)(3) actions.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE BURDEN OF PROOF IN A PROCEEDING BEFORE THE NATIONAL LABOR RELATIONS BOARD PURSUANT TO SECTION 8(a)(3) OF THE NATIONAL LABOR RELATIONS ACT REMAINS ON THE GENERAL COUNSEL AND DOES NOT SHIFT TO THE EMPLOYER.

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3), provides that it is an unfair labor practice for an employer, by discrimination in regard to hire or tenure of employment, to encourage or discourage membership in any labor organization. Pursuant to §10(c) of the Act, 29 U.S.C. §160(c), the National Labor Relations Board may order remedial action, if upon the preponderance of the testimony taken, the Board is of the opinion that any person named in the complaint has engaged in such an unfair labor practice. The Board is, however, prohibited by this section from requiring the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of

any back pay, if such individual was suspended or discharged for cause.

While the Act is designed to prohibit unfair labor practices, it also purports to strike a balance between an employee's right to engage in union activity and an employer's right to select its employees, to discipline them, or to discharge them. Thus, the general premise of the Act was very clearly articulated. "An employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937). It has been aptly stated that sections 8(a)(3) and 10(c) impose a standard which is simple to state but often difficult to apply to practice. NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F. 2d

899 (1st Cir. 1981).

In practice, it is usual to have competing explanations of the grounds for which an employee is discharged. The General Counsel, representing the interests of the employee, will often produce some evidence supporting a conclusion that the discharge was motivated by anti-union animus, and the employer will produce evidence supporting a conclusion that the discharge was motivated by the employee's misconduct. When the persuasive character of the proof on either side of the issue is perfectly balanced — when there is equipoise — then the controversy presented by the Board's rule of law in the instant case arises.

The NLRB, purportedly in reliance on Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), argues that once the General Counsel has presented a prima facie case indicating an anti-union motivation for a discharge, the burden of proof shifts to the employer to overcome that prima facie case. That is, once the

prima facie case is established, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Wright-Line, A Division of Wright Line, Inc., 251 N.L.R.B. 1083, 1089. The First and other Circuit Courts of Appeal, have properly determined that the appropriate statutes and regulations, and the holding of this Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), compel the conclusion that the employer need not carry the burden of proof, but need only produce sufficient credible evidence to rebut or neutralize the General Counsel's prima facie case. NLRB v. Wright Line, 662 F. 2d 899 (1st Cir. 1981); Behring International, Inc. v. NLRB, 675 F. 2d 83 (3rd Cir. 1982); NLRB v. Webb Ford, Inc., 689 F. 2d 733 (7th Cir. 1982).

A. The General Counsel Bears a Statutorily Mandated Burden of Proof in Actions Pursuant to Section 8(a)(3) of The National Labor Relations Act.

As with any other agency, the NLRB may act only in accordance with its statutory authority and must abide by any limitations placed on it by Congress. In the instant controversy the National Labor Relations Act itself imposes the burden of proving an unfair labor practice on the General Counsel. Section 10(c), 29 U.S.C. §160(c), states in part that:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order requiring such person to cease and desist from such unfair labor practices.

As interpreted by the Board's own regulations, this provision means that "[t]he Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act." 29 C.F.R.

§101.10(b) (1981). The Board itself has, acknowledged that the General Counsel bears the ultimate burden of establishing an unfair labor practice by a preponderance of the evidence. Wright Line, 251 N.L.R.B. 1083, n. 11.

Furthermore, even if the National Labor Relations Act, the Board's regulations, and the Board's own case precedent do not provide ample clarity in response to the question of the burden of proof in section 8(a)(3) cases, Congress has elsewhere supplied a general rule of practice in administrative actions of this sort. Section 7(c) of the Administrative Procedures Act states as follows: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d).

These statutes and regulations have been held to conclusively determine the issue in controversy by the First, Third and Seventh Circuits. As the First Circuit has stated, "Section 10(c), as well as the Board's own regulation, make clear that the

General Counsel must prove the employer's guilt by a preponderance of the evidence to warrant a finding that an unfair labor practice has occurred." NLRB v. Wright Line, 662 F. 2d at 904. "[T]he relevant statutes compel the result we reached." NLRB v. Transportation Management Corporation, 674 F. 2d 130, 133 (1st Cir. 1982) concurring opinion of Judge Breyer. Similarly, the Third Circuit has determined that, "[T]he Board is bound by statutory limitations which foreclose the issue. The Act itself imposes the burden of proving an unfair labor practice on the General Counsel." Behring International, Inc., v. NLRB, 675 F. 2d at 88. Likewise, the Seventh Circuit has agreed that shifting the burden of proof onto the employer runs "afoul of the Labor Act's strictures on burdens of proof as found at 29 U.S.C. §160(c)." NLRB v. Webb Ford, Inc., 689 F. 2d at 739.

The NLRB disputes the conclusion of these Courts, and seeks to justify its position by citing to various statements made during Congressional

hearings and debates on proposed amendments to the Wagner Act. Petitioner's brief at 17-21. But in working backward from the Congressional history to find that the plain meaning of a statute is in fact contradicted by implication, the Board ignores the well-advised admonition that "[T]he proper function of legislative history is to solve and not to create an ambiguity. Railroad Comm. of State of Wisconsin v. Chicago, B & Q.R.C. Co., 257 U.S. 563, 589 (1922); [other citations omitted]." United States v. Blasius, 397 F. 2d 203, 206 (2nd Cir. 1968), cert. dismissed, 393 U.S. 1008 (1969).

A basic canon of statutory construction is that when statutory language is clear on its face and fairly susceptible of but one construction, that construction shall be given to it. As this Court has observed in Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1977), "[L]ogic and precedent dictate that the starting point in every case involving construction of a statute is the

language itself." (citations omitted). It is both unnecessary and improper to allow an ambiguous and contradictory legislative history to override the plain meaning of the statutory language. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976); United States v. Oregon, 366 U.S. 643 (1961). It is, in any event, a step to be taken with considerable caution "against interpolating our notions of policy in the interstices of legislative provisions." Mr. Justice Frankfurter, in Scripps-Howard Radio v. FCC, 316 U.S. 4, 11 (1942), quoted in Piper v. Chris-Craft Industries, 430 U.S. 1, 26 (1977).

The accuracy of this admonition is well illustrated in the instant case. While faced with clear statutory language which imposes the burden of proof in a section 8(a)(3) action on the General Counsel, the Board relies on ambiguous and contradictory legislative history in an effort to justify its transfer of the burden of proof onto the employer. The legislative history relied on by the

Board resulted from a Congressional response to criticism that the NLRB was finding unfair labor practices "[e]ven when the Board admits that an employee was guilty of misconduct justifying discharge."[1] In response to this criticism the House of Representatives approved a bill which provided that:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, unless the weight of the evidence shows that such individual was not suspended or discharged for cause.

H.R. 3020, 80th Cong., 1st Sess. 39 (1947). Following objections by the Senate, a joint conference committee modified the House Bill by deleting the phrase "unless the weight of the evidence shows" and substituting "[i]f upon the

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[1]Amendments to National Labor Relations Act: Hearings on H.R. 8, H.R. 725, H.R. 880, H.R. 1095, and H.R. 1096. Before the House Comm. on Education and Labor, 80th Cong. 1st Sess. 2723 (1947) (Statement of Theodore R. Iserman).

preponderance of the testimony taken." However the conference bill which was ultimateely enacted, contained a prohibition against the Board requiring reinstatement of or back pay to an employee if such individual was suspended or discharged for cause. H.R. Rep. No. 510, 80th Cong., 1st Sess. 13 (1947). The Board points to comments made by Senator Taft in discussions of the conference bill as purportedly evincing a clear legislative intent to reaffirm what he alleged to be the Board's existing practice. According to Senator Taft, once the Board had shown an impermissible motive for a discharge, the employer was to bear the burden of proving that it would have taken the same action for lawful reasons. 93 Cong. Rec. 6494, 6518-19 (1947). However, the Ninth Circuit has pointed out, contrary to Senator Taft's comments, that the pre-1947 decisions of the Board had in fact <u>not</u> been consistent in placing any such burden of proof

on the employer.[2] Zurn Industries, Inc. v. NLRB, 680 F. 2d 683, 692, n. 15 (9th Cir., 1982).

The legislative history also indicates that Taft's interpretation of the impact of the bill was strongly disputed. In fact, the statement of the House managers that accompanied the conference bill explains that the Board could find a violation only upon a preponderance of the evidence and that an employee shown to be discharged for cause was not to be afforded a statutory remedy, whether or not he was also engaged in union activities. H.R. Rep. No. 510 at 55, 80th Cong., 1st Sess. (1947). The House managers' opinion of the effect of the amendments was shared by Senator Pepper, who disputed Senator Taft's comments and argued that

[2]See, NLRB v. Entwistle Manufacturing Co., 120 F. 2d 532, 536 (4th Cir., 1941), and NLRB v. Barrett Co., 135 F. 2d 959, 962 (7th Cir., 1943), which held that the Act placed the burden of proving a legitimate reason for a discharge on the employer, and NLRB v. Union Manufacturing Co., 124 F. 2d 332, 333 (5th Cir., 1941), and Martel Mills Corp. v. NLRB, 114 F. 2d 624, 632 (4th Cir., 1940), citing NLRB v. Remington Rand, Inc., 94 F. 2d 862, 872 (2nd Cir., 1938), which held that under the Act the employee bore the burden of proof.

the bill would impose a burden on the employee to prove that he was discharged for union activities, rather than to make the employer prove that the worker was discharged for cause. 93 Cong. Rec. 6494, 6518-19 (1947). Thus, contrary to the Board's assertion that the legislative history conclusively shows a Congressional intent to place a burden of proof on the employer, all the history shows is a divergence of opinion on the effect of the amendment.

Even the Ninth Circuit, which has adopted the Board's Wright Line test, has stated that the legislative history is not conclusive. Zurn Industries, 680 F. 2d at 693. Yet, in the face of the clear language of Section 10(c) of the National Labor Relations Act, the Board's regulation 101.10(b), and section 7(c) of the Administrative Procedures Act, that Circuit reasoned that there is "no need to fathom the Congressional intent; it is sufficient for our present purposes if the history does not foreclose a legislative purpose to place on

the employer the burden of proving the presence of a legitimate cause." Id. at 689. This reasoning grants to the NLRB discretion simply foreclosed to it by statute.

Similarly, the Eighth Circuit, without addressing the statutory mandates or the Congressional history, upheld the Wright Line test as articulated by the Board, holding that there is "a reasonable basis in law" for the Board's use of the test, and therefore that it may be applied. N.L.R.B. v. Fixtures Manufacturing Corp., 669 F. 2d 547 (8th Cir., 1982). In analyzing this decision, the First Circuit concluded that the Court had relied upon the belief that the overall burden of proof is a question on which a court should defer to agency views. NLRB v. Transportation Management Corp., 674 F. 2d at 133, (Judge Breyer, concurring opinion). This reasoning is erroneous, since "[w]hether the Board can impose such an overall burden on the employer is a pure question of law. It involves a major and important

section of the authorizing statute; it is not 'interstitial;' and the language of the statute as well as its legislative history seems clear." Id. As Judge Breyer has asked, "[H]ow in the face of this language, is it possible not to hold that the overall burden of proving a violation remains with the Board?" Id.

B. The Court of Appeals Correctly Applied the Standards Set Forth By This Court in Allocating the Burden of Proof Between the General Counsel and the Employer.

In formulating the Wright Line test the NLRB departed from its prior view that discipline motivated in part by discriminatory reasons was unlawful, even if it might otherwise be motivated by lawful reasons. See Wright Line, 251 NLRB at 1084. This departure was prompted by increasing criticism from various Circuits that the "in part" test ignored the legitimate business motive of the employer and placed "the union activist in an almost impregnable position once union animus has been established." NLRB v. Wright Line, 662 F. 2d

at 902. In addition, as the Board admitted, "[T]he conflict over which test to apply in dual motive cases has now spread throughout the circuit courts to the extent that a review of the tests currently applied by the Board, our Administrative Law Judges, and the various courts of appeals reveals a picture of confusion and inconsistency." Wright Line, 251 NLRB at 1085.

Following the decision by this Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), the Board announced that,

> We shall henceforth employ the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the

protected conduct. Wright Line, 251 NLRB at 1089.

This test has been referred to as the "dominant motive" or "but for" test, that is, would the discharge have occurred "but for" the protected union activity. As justification for the Wright Line test the Board cites the test's consistency with the standards set by this Court in Mt. Healthy. Initially the burden is placed upon an employee to show that his conduct was protected and that this conduct was a substantial or motivating factor in the employer's decision to discharge him. If the employee carries this burden, the employer must then show by a preponderance of the evidence that it would have reached the same decision on discharge even in the absence of the protected conduct. Mt. Healthy v. Doyle, 429 U.S. at 287.

In analyzing the the Board's Wright Line test, the First Circuit agreed that the "but for" test is the correct substantive standard for evaluating the propriety of a discharge, but disagreed with the Board's allocation of the burden of proof. Citing

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), as providing the proper procedural rules for section 8 actions, the Court concluded that on both statutory and factual grounds the standards set by Mt. Healthy are inapplicable to actions initiated under section 8(a)(3) of the National Labor Relations Act. N.L.R.B. v. Wright Line, 662 F. 2d at 905, 906.

The Mt. Healthy case is statutorily distinguishable from the case at hand. The plaintiff in Mt. Healthy filed an action pursuant to 42 U.S.C. §1983 alleging that the Defendant had violated his First and Fourteenth Amendment rights. Unlike the instant case, the plaintiff was not seeking relief from an administrative agency but rather directly from the Court. Consequently, statutorily mandated procedures, such as the Administrative Procedures Act and pertinent sections of the National Labor Relations Act, simply did not there apply. However, in the instant matter, these provisions must be applied, and

consequently the burden of proof of a violation must remain on the General Counsel. To ignore those statutes would impermissibly negate the clearly stated will of Congress.

Mt. Healthy is also factually distinguishable from the instant case, which is typical of those brought under section 8(a)(3) of the National Labor Relations Act. In Mt. Healthy, a School Board denied a teacher tenure based upon a communication made by the teacher to a local radio station, and upon certain disruptive and unprofessional conduct. The School Board conceded that one of the grounds for the discharge was the communication, which was later found to be protected under the First Amendment. Having admitted its impermissible motive in the discharge, the School Board then alleged that the teacher's other conduct justified the discharge notwithstanding the fact that the employer had violated the employee's constitutional rights. The arguments of the School Board, therefore,

constituted a true affirmative defense concerning the appropriateness of the remedy, rather than the existence of a violation. In the absence of any statutorily imposed allocation of the burden of proof with respect to affirmative defenses, this Court appropriately determined that the School Board had to bear the burden of proving its affirmative defense.

Mt. Healthy, while logical and consistent with the factual pattern on which it is premised, is inapposite in the instant case, and in cases typical of those brought under Section 8(a)(3). Here, the employer has denied that the discharge was motivated by an anti-union animus and has alleged that the discharge was prompted solely by the employee's misconduct. Unlike the School Board in Mt. Healthy, the employer has not conceded that it interfered with the employee's protected activity. The employer is not, therefore, raising a true affirmative defense as to the appropriateness of a remedy to rectify the violation of an employee's

rights but is, rather, contesting the fact that any such violation occurred. The Court of Appeals concluded that under this fact pattern the allocation of the burden of proof provided in this Court's decisions in cases alleging violations of Title VII of the Civil Rights Act of 1964, rather than the allocation provided under Mt. Healthy, most logically and consistently applies to Section 8(a)(3) actions.

This Court has conclusively established the allocation of the burdens in a Title VII case.

> "[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff...." The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason. The defendant need not persuade the Court that it was actually motivated by the proferred reasons. It is sufficient if the defendant's evidence raises a genuine issue

> of fact as to whether it discriminated against the plaintiff.

Texas Department of Community Affairs v. Burdine, 450 U.S. at 253, 254.

The reliance by the Court of Appeals on the standards set forth in Burdine is not only consistent with the statutory mandate that the General Counsel bears the burden of persuasion in a Section 8(a)(3) action, but is also faithful to the common rules of civil practice. According to the Board's Wright Line test, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Both the Court of Appeals and this Court have interpreted the phrase "prima facie case" in its traditional sense, that is, the establishment of a legally mandatory, rebuttable presumption. N.L.R.B. v. Wright Line, 662 F. 2d at 905; Texas Department of Community Affairs v. Burdine, 450 U.S. at 254. Accordingly, the burden on the defendant is merely to meet or

rebut the prima facie case. Thus, "[a] 'prima facie' case...need not be overcome by a preponderance of the evidence, or by evidence of a greater weight; but the evidence needs only be balanced, put in equipoise, by some evidence worthy of credence...." N.L.R.B. v. Wright Line, 662 F. 2d at 905, quoting 9 Wigmore on Evidence §2487, at 282 (3d ed. 1940).

In fact, absent the interpretative gloss placed on it by the agency, the Board's Wright Line test is in accordance with the traditional allocation of the burden of proof. According to the test, once the General Counsel makes a prima facie showing of discriminatory motive, the burden shifts to the defendant to "demonstrate that the same action would have taken place even in the absence of the protected conduct." Wright Line, 251 N.L.R.B. at 1089. Had the Board interpreted the word "demonstrate" to mean bearing only the burden of production, rather than the burden of proof its ruling would have provided no conflict with the

governing statutes and case law.

The Board argues that requiring the employer to bear only the burden of production, rather than proof, would "seriously chill the exercise of Section 7 rights by employees, by undermining the effectiveness of the statutory protection for exercise of those rights." Petitioner's brief at 37. Discrimination in employment because of race, religion, or nationality is often as subtle and as difficult to ferret out as that resulting from anti-union bias. Yet, when faced with an argument that placing the burden of proof on an employee in Title VII cases would chill the exercise of the employee's rights, this Court was unpersuaded that limiting an employer's evidentiary obligation to a burden of production would unduly hinder the plaintiff. Texas Department of Community Affairs, 450 U.S. at 258. As this Court noted, the employer's explanation of its legitimate reasons must be clear and reasonably specific. Furthermore, although the employer does not bear a formal burden of

persuasion, the employer retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation. Id. Since the same considerations are present where the alleged discrimination is based on union activity the Burdine procedures should be followed in those cases as well as in Title VII cases.

CONCLUSION

The Court of Appeals properly concluded that the burden to be placed on an employer in a proceeding pursuant to Section 8(a)(3) of the National Labor Relations Act is that of producing credible evidence to rebut or neutralize the General Counsel's prima facie case, and not that of overcoming the prima facie case.

NEW ENGLAND LEGAL FOUNDATION AND THE ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS,

By their Attorneys,

January 30, 1983

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(SHOW) PROCEEDINGS AND ORDERS DATE: 033083

CASE NBR 82-1-00168 CFX

SHORT TITLE NLRB DOCKETED: Jul 30 1982

VERSUS Trans. Management Corp.

Date	Proceedings and Orders
Jun 17 1982	Application for extension of time to file petition and order granting same until July 30, 1982 (Brennan, June 18, 1982).
Jul 30 1982	Petition for writ of certiorari filed.
Sep 22 1982	DISTRIBUTED. October 8, 1982
Sep 22 1982	Order extending time to file response to petition until October 22, 1982.
Oct 22 1982	Brief of respondent Trans. Management Corp. in opposition filed.
Oct 25 1982	Motion of Council on Labor Law Equality for leave to file a brief as amicus curiae filed.
Oct 27 1982	DISTRIBUTED. November 12, 1982
Nov 8 1982	REDISTRIBUTED. November 12, 1982
Nov 15 1982	Motion of Council on Labor Law Equality for leave to file a brief as amicus curiae GRANTED.
Nov 15 1982	Petition GRANTED.
	**********
Dec 30 1982	Brief amicus curiae of AFL-CIO filed.
Jan 3 1983	Brief of petitioner National Labor Relations Board filed.
Jan 4 1983	Joint appendix filed.
Feb 1 1983	Brief of respondent Trans. Management Corp. filed.
Feb 1 1983	Brief amicus curiae of Chamber of Commerce of U.S. filed.

CONTINUE (

PROCEEDINGS AND ORDERS DATE: 033083

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Date	Proceedings and Orders
Jan 31 1983	Motion of New England Legal Foundation, et al. for leave to file a brief as amici curiae filed.
Feb 3 1983	Application for leave to file amicus brief in excess of page limitations, and order granting same by Brennan,
Feb 3 1983	J., 2/3/83, not to exceed 51 pages.
Feb 4 1983	Brief amicus curiae of Council on Labor Law Equality filed.
Feb 15 1983	SET FOR ARGUMENT. Monday, March 28, 1983. (1st case)
Feb 22 1983	Motion of New England Legal Foundation, et al. for leave
Feb 22 1983	Motion of New England Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
Mar 5 1983	Supplemental brief of respondent Trans. Management Corp. filed.
Mar 17 1983	Record filed.
Mar 17 1983	Certified original record & C.A. proceedings received.
Mar 18 1983	Reply brief of petitioner filed.
Mar 28 1983	ARGUED.